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CURRENT EVENTS.

LORD CAMPBELL'S ACT — THE ALABAMA VERSION.—We publish in this number[1] an annotated case, in which the Supreme Court of Alabama holds that no action can be maintained under the Alabama version of Lord Campbell's act against one who sells or gives liquor to a person so utterly drunken that he dies upon the spot after swallowing the additional poison. The court holds that, under the terms of the act, as the deceased could not, if he had survived the dose, have supported an action against the vendor of the liquor, so his representatives are also debarred from a remedy under that statute; that the drinking of the liquor, which was the act of the deceased, was the proximate cause of his death, and that the act of the defendant, in selling or giving the liquor, was only the *remote* cause, and that fact protected him from liability.

We do not propose to controvert the construction which the court puts upon the statute, and if we did, this is not the proper place for that purpose. We take the occasion, however, to protest against the defect in the statute which this ruling has disclosed, and which we presume exists as well in the original Lord Campbell's act as in all the numerous American reproductions of it. We do not see why the redress of a plaintiff, whose father or husband has lost his life in consequence of the fully established tort, wrong doing or illegal act of another person, should be limited to cases in which the deceased, if he had survived, could have maintained an action for damages. That point is merely collateral and, logically, its effect should be merely in mitigation of damages. The *gravamen* of the action is the illegal act and its fatal result. The wrong and injury for which the defendant is held to answer is not the wrong and injury inflicted upon the deceased, but that suffered by the survivor who is interested in his life. If one by any illegal act deprives a husband or father of life, he is guilty of a double wrong—to the deceased and to the widow or orphan. For the first no redress can be given—the sufferer has passed beyond human judgment and human remedy. To the second, however, the wrong-doer is responsible, and the ground of his liability is not that he deprived the deceased of life, but that he deprived the widow of her husband or the orphan of his father. And why in reason, or in common sense their remedy should be made to depend upon the supposed remedy of the deceased *if* he had survived the injury, or *if*, from beyond the grave, he could institute a civil action, it is hard to conceive.

While there is no reason for the rule, its origin is very obvious. Before Lord Campbell's act no action could be maintained for the loss of human life, the common law theory being that it was priceless and could not be paid for. This is obvious, self-evident, so far as the dead man is concerned. The fallacy consisted in applying this self-evident proposition to the survivors interested in the life of the deceased. To them his life was not absolutely priceless; it could be at least partially paid for. To them it meant, among other things, food and clothing, and house and home, shelter and comfort, and recognizing this meaning Lord Campbell's act provided that, in proper cases, these things at least should be paid for. That neither that statute nor any of the American copies of it went any farther and dissevered the reasonable cause of action of the survivor from the hypothetical remedy of the deceased, was probably because the framers of those acts feared to go too far and abrogate without pressing necessity one of the venerable maxims of the common law.

However that may be, it is manifest to us that there is no substantial reason why the real cause of action of the survivor should depend for its validity upon the possible hypothetical remedy of the deceased. As the law now stands, a widow is entitled to damages if her husband's death is caused by the wrongful act or omission of another person or corporation, but if his negligence or inadvertence contributed, however slightly, to the fatal result, she is deprived of her remedy. The contributory negligence or inadvertence was no fault of hers, nor did it in any degree

[1] *Post*, p. 178.

lessen the fault of the defendant, without which the disaster would not have been possible. Her bereavement and privation are not at all the less because of the contributory negligence of her husband, and if in morals and sound legal policy she is entitled to compensation for her loss, it is not reasonable that the law should deny it to her absolutely because of slight or casual inadvertence or negligence, especially as the courts are so astute in construing, as contributory negligence, almost any deviation from the ordinary routine of daily occupation. To us it seems but sheer justice that, whenever the tort or negligence of the defendant has been clearly established, the contributory negligence of the deceased should only be admissible in evidence in mitigation of damages. This rule would divide the responsibility of the parties, throwing upon the defendant the share of the loss which the proof shows is clearly chargeable upon him, and upon the plaintiff that portion of it which resulted from the default or misconduct of the deceased. Whether this modification of the statute would do exact and even-handed justice between the parties may well be doubted, but it would be more equitable than the law as it stands.

We have a further remark to make concerning this Alabama case. It is in a moral sense *coram non judice* in a civil court. The law of Alabama, besides giving a civil remedy, makes it a misdemeanor[2] to sell or give intoxicating liquor to persons of known intemperate habits. Furnishing such liquor to a person helplessly drunk was a manifest violation of this law, and the vendor seems to have been liable to an indictment for a misdemeanor, if not (as death so promptly ensued) for manslaughter or murder. It is a striking evidence of the imperfection of the law that it affords no civil remedy for an action so grossly illegal.

[2] Ala. Code 1876, § 4205.

NOTES OF RECENT DECISIONS.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—IMPUTED NEGLIGENCE.—On the 24th of January, 1887, the English Court of Appeals decided a case[1] in which it places itself, on the subject of imputed negligence, in accord with the best line of American rulings on that subject. It expressly overrules the case of Thorogood v. Bryan,[2] which has stood as law in England for thirty-eight years, and holds that one who is a passenger in a public conveyance does *not* identify himself with the conveyance or the persons in charge of it, and that their negligence, direct or contributory, can in no respect be imputed to him.

We had occasion to examine this matter some months ago,[3] and endeavored to show that the rulings in Thorogood v. Bryan,[4] and American cases[5] which followed it, were founded upon a gross perversion of legal principles and an abuse of legal terms and relations, utterly inconsistent with right, reason or common sense.

The doctrine now adopted by the court of appeals, and we may well presume, established as the settled law of England on the subject, had, as we showed in our former article, been previously adopted by the Supreme Court of the United States,[6] by the New York Court of Appeals,[7] by the Supreme Court of Minnesota,[8] and the same view of the law had been taken in New Jersey,[9] in Ohio[10] and in Illinois.[11]

It is noteworthy that, with one accord, the English legal press hail this ruling with satisfaction, and have the grace to accord to the American courts the credit of having led the way.

The *London Law Times*, commenting on the case, says:

"The doctrine laid down in Thorogood v. Bryan,[12] that a passenger in a public conveyance, injured by the negligent management

[1] The Bernina, Armstrong v. Mills (reported in all the current periodical English reports).
[2] 8 C. B. 115; S. C., 18 L. J. 336, C. P.
[3] 23 Cent. L. J. 410.
[4] *Supra*.
[5] Prideaux v. City of Mineral Point, 43 Wis. 513; Houfe v. Fulton, 29 Wis. 296; Otis v. Janesville, 47 Wis. 422; Lake Shore, etc. R. Co. v. Miller, 25 Mich. 274; Lockhart v. Lectenthaler, 46 Pa. St. 151.
[6] Little v. Hackett, 6 S. C. Rep. 391.
[7] Robenson v. N. Y. Central, etc. R. Co., 66 N. Y. 11; Dyer v. Erie, etc. R. Co., 71 N. Y. 228; Maslerson v. N. Y. Central, etc. R. Co., 84 N. Y. 247.
[8] Follman v. City of Monkato, 29 N. W. Rep. 317.
[9] Bennett v. New Jersey, etc. R. Co., 36 N. J. L. 225; New York, etc. R. Co. v. Steinbrenner, 46 N. J. L. 161.
[10] Transfer Co. v. Kelly, 36 Ohio St. 86.
[11] Wabash, etc. R. Co. Shacklett, 105 Ill. 364.
[12] 8 C. B. 115; 18 L. J. 336, C. P.

of another conveyance, cannot maintain an action against the owner of the latter, if the driver of the former, by the exercise of proper care and skill, might have avoided the accident, has at length been overruled. The ground upon which the court, in Thorogood v. Bryan, based this startling proposition was, that the passenger in selecting a vehicle so identifies himself with its owner, and therefore with its driver, that the negligence of the driver is to be considered as the negligence of the passenger himself. Starting from this assumption, the court not unnaturally came to the conclusion that the rights of the passenger against the owner of the other vehicle were restricted so as to deprive him of any right of action. The court of appeal fails to see any ground for the assumption. The passenger has no control over the driver, he cannot control his movements, and is, in fact, powerless to prevent his negligence. As the court of appeal points out, if the passenger is so identified with the driver as to be deemed to be guilty of negligence, and therefore deprived of a right of action, it must necessarily follow that, in addition to his rights being curtailed, his liabilities are correspondingly enlarged, and the result is, that every passenger in an omnibus, or other public conveyance, is necessarily liable to third parties for the negligence of the driver. The absurdity and injustice of such a doctrine are so obvious as not to need observation."

Other English legal periodicals express similar views. To us it is not so remarkable that there should be so much unanimity on the subject *now*, as it is that so gross and manifest an absurdity and injustice should have been so long accepted as a component part of the law which arrogates to itself the distinction of being the perfection of reason.

The decision was originally a glaring abuse of the privilege of legislating under the form of expounding the law and declaring what it really is, which the courts have so long and so freely exercised.

With the design of making the law consistent and symmetrical, the courts, in many cases, as in the one under consideration, seek to fit undeniable legal principles to facts and circumstances to which they are in no degree germane. In comparison with some of their rulings made in pursuance of this theory, the bed of Procrustes was a logical institution.

CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—JURY—PEREMPTORY CHALLENGE.—In a recent case[1] the Supreme Court of the United States construed the fourteenth amendment to the constitution of the United States, so far as it was supposed to affect the rights of persons tried for murder in the city of St. Louis, Mo., and the right of the prosecution in such cases to challenge jurors peremptorily. The facts were that Hayes was convicted in St. Louis of a murder perpetrated in that city. He sued out a writ of error, by which the case was taken to the Supreme Court of the United States, and it was assigned for error that the trial court had permitted the prosecution to challenge peremptorily fifteen persons offered as jurors. It was conceded that, under the laws of Missouri,[2] the prosecution was allowed fifteen peremptory challenges in cities having a population of over 100,000 inhabitants (St. Louis being a city of that class), although elsewhere in the State the number of challenges allowed to the prosecution was limited to eight. This discrimination against him and other persons tried for murder in the City of St. Louis, it was contended on behalf of Hayes, was repugnant to the fourteenth amendment of the constitution of the United States, which secures to all persons the equal protection of the laws.

The supreme court held that the discrimination made by the statutes of Missouri between the rural and urban portions of that State, in the matter of peremptory challenges in criminal cases, in no degree impaired the equal protection of the laws guaranteed by the amendment in question to all citizens; that the object and only effect of those statutes was to secure impartial juries in criminal cases; that to attain that object the State might well allow to the prosecution a larger number of peremptory challenges in large cities than in sparsely settled regions, and that neither the object of statutes of this character nor their effect and operation afforded any ground whatever for objection by persons accused of crime. The whole subject of challenges, the court said, was under the control of the State legislatures, which may well discriminate as to the prosecution's

[1] Hayes v. Missouri, 7 S. C. Rep. 350.
[2] Rev. Stat. Mo. (1879) §§ 1900, 1902.

number of challenges, according to the condition of different communities. In support of these views the court cites several authorities:[3]

[3] Stokes v. People, 53 N. Y. 164; Walter v. People, 32 N. Y. 147; Commonwealth v. Dorsey, 103 Mass. 412, 418.

JUDICIAL CONTROL OF PUBLIC OFFICERS.

Our national government is one of checks and balances. Each of the three great branches, the legislative, executive and judicial, operates as a check upon the others. And in this respect our State governments are all patterned, in a greater or in a less degree, after the national government. In the constitutions of all of them we may expect to find, as Judge Cooley says, "separate departments for the exercise of legislative, executive and judicial power, and care taken to keep the three as separate and distinct as possible, except so far as each is made a check upon the other to keep it within proper bounds, or to prevent hasty and improvident action. The executive is a check upon the legislature in the veto power, which most States allow; the legislature is a check upon both the other departments through its power to prescribe rules for the exercise of their authority, and through its power to impeach their officers; and the judiciary is a check upon the legislature by means of its authority to annul unconstitutional laws."[1] This theory of government is an excellent one, but in practice it is not always easy to determine how far the officers of one department may go without encroaching on the territory of another. The balance of power, with respect to the different departments of our government, has been almost as troublesome a question as that of the balance of power among the nations, in European politics. "Power," says Story, "is of an encroaching nature and, it ought to be effectually restrained from passing the limits assigned to it. Having separated the three great departments by a broad line from each other, the difficult task remains to provide some practical means for the security of each against the meditated or occasional invasions of the others."[2] As Judge Story says, the line separating the different departments is a broad one. That is one source of trouble, it is too broad; it contains debatable ground.

But while it has been found necessary to leave the line of separation a broad one, in order that one department may guard and check the others, it is nevertheless true that they form co-ordinate branches of the government, and that each is supreme within its own proper sphere.[3]

The courts have, therefore, again and again refused to interfere with the governmental or political acts of public officers. Such interference could, as a rule, cause nothing but mischief, and would amount to an encroachment by one branch of the government upon another.[4] Thus, it has been held by the Supreme Court of Missouri, that the courts have no jurisdiction to compel the governor of a State by *mandamus* to issue a commission to an officer, the court saying per Wagner, J.: "The constitution has divided the powers of government into three distinct departments—the legislative, executive, and judicial—and provided for their independent exercise. They are each co-ordinate and independent of the other, within the sphere of their powers, duties and functions. The legislature cannot compel by enactment this court to enter up a certain judgment, nor can this court coerce the legislature into the passing of a law. The governor has no right, nor would he be permitted to interfere with the action of this court, nor can the court control him in the exercise of executive duties devolved on him by law. The interference of either branch with the other would imply dependence and

[1] Cooley's Const. Lim., 34.

[2] 1 Story on Const., § 530. See also Federalist, No. 48.

[3] Wright v. Defrees, 8 Ind. 298; Little v. State, 90 Ind. 338; State v. Sloss, 25 Mo. 291; Cooley's Const. Lim., 41, 133; People v. Bissell, 19 Ill. 229; s. c., 68 Am. Dec. 591.

[4] Sutherland v. Governor, 29 Mich. 320, opinion by Cooley, J.; Marburg v. Madison, 1 Cranch, 137; Gaines v. Thompson, 7 Wall. 347; Mississippi v. President, 4 Wall. 475; People *ex rel.* Roosevelt v. Edson, 52 N. Y. Sup. Ct. Rep. 53; 8 Am. & Eng. Corp. Cas., 135; Pacific R. R. Co. v. Governor, 23 Mo. 353; Tennessee, etc. R. R. Co. v. Moore, 36 Ala. 380; Magruder v. Swan, 25 Md. 212; Hawkins v. Governor, 1 Ark. 346; s. c., 33 Am. Dec. 346; U. S. v. Lytle, 5 McLean, 17; Tiernan v. Woodruff, *Ib.* 134. See also Judge Cooley's essay on "Checks and Balances in Government," 3 Atlas Essay, 140.

inferiority, when by our peculiar frame of government there exists equality and independence."[5] So it has been held that the secretary of the navy cannot be compelled by *mandamus* to pay a pension,[6] or the secretary of the treasury to credit a party on the books with a sum found by a jury to be due him from the United States,[7] nor to pay a territorial judge a salary alleged to be due.[8] Nor can the president be controlled either by injunction or *mandamus* in the exercise of his executive discretion.[9] Nor will injunction lie to restrain the secretary of the interior from cancelling an entry in the land office.[10] And where an injunction was sought to restrain the mayor of New York, acting in a public capacity under authority conferred upon him by the legislature, from proceeding to appoint a corporation attorney, it was held that the court has no jurisdiction to enjoin him, no matter whether his motives in making the appointment were good or bad.[11] Commenting on this case before its final decision, the editor of the CENTRAL LAW JOURNAL, in the issue of January 30, 1885, said: "The singular thing connected with it is, that the writ of injunction should be employed to restrain the appointment of public corporation officers. There is no principle known to the students of the books which warrants such a use of the writ of injunction."[12] Other illustrations will be found on consulting the authorities cited in note 4, *supra*. It has been held by the highest courts of many of the States that in no case will *mandamus* lie against the governor or head of the executive department, while other courts have held that, where no discretion is involved and the duty is a ministerial one, the governor may be made to perform it by the courts. The weight of authority, however, is to the effect that courts have no jurisdiction to interfere with the official acts of the chief executive, no matter of what nature they may be. Such is the holding in Arkansas,[13] Georgia,[14] Florida,[15] Illinois,[16] Louisiana,[17] Maine,[18] Michigan,[19] Mississippi,[20] Minnesota,[21] Missouri,[22] New Jersey,[23] Rhode Island,[24] Tennessee,[25] and Texas.[26] On the other hand, this power is declared to exist in Alabama,[27] California,[28] Maryland,[29] Montana,[30] North Carolina,[31] and Ohio.[32] As in the case of the Saracen's Head "much may be said on both sides," but the text-writers seem to take the side of the minority.

It is well settled, as a general rule, that courts cannot control a public officer, either State or national, in the exercise of a discretion, with which he is vested by virtue of his office.[33]

It is also a well settled general rule that an injunction will not be granted where there is an adequate remedy at law.[34] Nor can resort

[5] State *ex rel.* Bartley v. Governor, 39 Mo. 388, opinion 394.

[6] Decatur v. Paulding, 14 Pet. 497.

[7] Reside v. Walker, 11 How. 272.

[8] U. S. v. Guthrie, 17 How. 284.

[9] Wilson v. Izard, 1 Paine, 70; State of Mississippi v. Johnson, 4 Wall. 475.

[10] Gaines v. Thompson, 7 Wall. 347.

[11] People *ex rel.* Roosevelt v. Edson, 52 N. Y. Sup. Ct. Rep. 53; s. c., 8 Am. & Eng. Corp. Cas. 135.

[12] 20 Cent. L. J. 82.

[13] Hawkins v. Governor, 1 Ark. 570; s. c., 33 Am. Dec. 346.

[14] Low v. Towns, 8 Ga. 360.

[15] Bisbee v. Drew, Gov., 17 Fla. 67.

[16] People v. Bissell, 19 Ill. 229; s. c., 68 Am. Dec. 229.

[17] State v. Warmouth, 22 La. Ann. 1; s. c., 2 Am. Rep. 712.

[18] *In re* Dennett, 32 Me. 508.

[19] People *ex rel.* Sutherland v. Governor, 29 Mich. 320; s. c., 18 Am. Rep. 89.

[20] Vicksburg & Meridian R. R. Co. v. Lowry, 51 Miss. 102; s. c., 48 Am. Rep. 76.

[21] Rice v. Governor, 19 Minn. 103.

[22] State v. Governor, 39 Mo. 388. But see State v. Vail, 53 Mo. 97.

[23] State v. Governor, 25 N. J. L. 331.

[24] Maurau v. Smith, 8 R. I. 192; s. c., 5 Am. Rep. 564.

[25] Turnpike Co. v. Brown, 8 Baxt. 490; s. c., 53 Am. Rep. 713.

[26] Houston R. R. Co. v. Randolph, 24 Tex. 317.

[27] Tennessee, etc. R. R. Co. v. Moore, 36 Ala. 380. But see Chisholm v. McGhee, 41 Ala. 197.

[28] Middleton v. Low, 30 Cal. 596; Harpending v. Haight, 39 Cal. 189.

[29] Magruder v. Swan, 25 Md. 212; Groome v. Swinn, 43 *Id.* 572.

[30] Chumesero v. Potts, 2 Mont. 242.

[31] Catten v. Ellis, 7 Jones L. 545.

[32] State v. Chase, 5 Ohio St. 528; High on Extr. Rems., § 118; Morse on Mandamus, 82. For an elaborate and exhaustive consideration of this question, with statement of the reasons for either view, see note to Hawkins v. Governor, 33 Am. Dec. 346, 362, *et seq.*

[33] New Orleans Nat. Bank v. Merchant, 18 Fed. Rep. 841; State *ex rel.* Winterburg v. Demaree *et al.*, 80 Ind. 519; People v. Village of Hyde Park (Ill.), 6 N. E. Rep. 33; People *ex rel.* Ambler v. Atty.-General, 38 Mich. 746; State v. Whitcomb, 28 Minn. 50; s. c., 8 N. W. Rep. 902. And see authorities cited in note 4, *supra*.

[34] Delahanty v. Horner, 75 Ill. 185; s. c., 20 Am. Rep. 237; Sims v. City of Frankfort, 79 Ind. 446; Leslie v. St. Louis, 47 Mo. 474; Youngblood v. Sexton, 32 Mich.

be had to the extraordinary remedy of *mandamus*, when there is any other specific and adequate remedy.[35] But where there is no other adequate remedy, and the act sought to be coerced is a ministerial one, imposed on a public officer as an absolute duty, the courts will often interfere by *mandamus* to compel him to perform it.[36] Thus, it is held that *mandamus* will lie to compel the auditor of State to audit demands provided for by law;[37] to compel a county treasurer to permit an inspection of the public records;[38] to compel the delivery of books and papers belonging to a public office, where the title to the office is not in issue;[39] to compel an election board to canvass and make returns of the votes cast at a general election;[40] to compel a clerk to approve an official bond;[41] and to enforce the performance of many other ministerial acts by public officers.[42]

So, also, will courts of equity often interfere, by injunction, to prevent the performance of a ministerial act by a public officer contrary to his duty and calculated to cause irreparable injury.[43] Thus, where the case is a clear one, State officers may be restrained from committing a breach of trust injuriously affecting public rights or franchises.[44] So, it is held, the secretary of state may be enjoined from revoking the license of a foreign insurance company pursuant to a law already declared void.[45] And inferior boards and officers may generally be restrained from exceeding their powers on a proper showing being made.[46] But it is only in cases where the right is clear and the judgment or decree capable of being enforced that courts will attempt to interfere, either by *mandamus* or injunction.[47]

In an important case which has just been decided by the Supreme Court of Indiana the principles above stated were applied, the court holding that the secretary of the state could not be enjoined from transmitting to the speaker of the house of representatives the certified statement of the number of votes cast for lieutenant-governor, as required by statute. It was argued that there was no vacancy and no right to hold an election under the fact in the case, but the court refused to consider that question, on the ground that it had no jurisdiction to grant an injunction in any event. In the course of the opinion, by Elliott, C. J., it is said: "We doubt whether papers directed by law to be delivered to a designated officer can in any case be stopped by injunction in the hands of a mere custodian charged with the duty of delivering them; we are clear that they cannot be stopped by injunction in such a case as that which this record presents to us. If the courts shoujd enjoin the secretary of state no substantial result would be accomplished, because duplicates of the papers are in the hands of the members of the general assembly who are charged by him with the duty of delivering them to the speaker to whom they are addressed, and the courts cannot enjoin legislators from performing a duty cast upon them by law. Decrees of courts in injunction cases can only be enforced by punishing, by fines, or imprisonment, those who disregard them, and it cannot be true that courts can fine or

406; S. C., 20 Am. Rep. 654; 2 Story's Eq. § 864; High on Injunctions, § 30, and authorities there cited.

[35] Reading v. Commonwealth, 11 Penn. St. 196; S. C., 51 Am. Dec. 534; Board of Police v. Grant, 9 Smedes & Marsh (Miss.), 102; S. C., 47 Am. Dec. 102; Habersham v. Sears, 11 Oreg. 431; S. C., 50 Am. Rep. 481; Harrison School Twp. v. McGregor, 96 Ind. 185; Mansfield v. Fuller, 50 Mo. 338.

[36] Ayers v. State, 42 Mich. 422; S. C., 4 N. W. Rep. 274; State v. Dubuelet, 24 La. Ann. 16; Towle v. State, 3 Fla. 202; State v. Moore, 42 Ohio St. 103; State v. Garesche, 3 Mo. App. 584; Kendall v. U. S., 12 Peters, 524.

[37] Mansfield v. Fuller, 50 Mo. 338. Compare Reeside v. Walker, 11 How. 272.

[38] Brown v. Co. Treas., 54 Mich. 132; S. C., 52 Am. Rep. 800.

[39] Territory v. Shearer, 2 Dak. 332; S. C., 8 N. W. Rep. 135; McGee v. State, 103 Ind. 444; S. C., 3 N. E. Rep. 139.

[40] State *ex rel.* Bloeham v. Gibbs, 13 Fla. 55; S. C., 7 Am. Rep. 233. See also State v. Garesche, 3 Mo. App. 526. Compare Dalton v. State, 11 Am. & Eng. Corp. Cas. 78.

[41] Gulich v. New, 14 Ind. 93.

[42] See authorities cited in note, *supra*. For an excellent definition of a "ministerial act" see Pennington v. Streight, 54 Ind. 376; also Arberry v. Beavers, 6 Tex. 457; S. C., 55 Am. Dec. 791.

[43] 3 Pom. Eq. Jur., § 1345 and authorities there cited; also High on Inj., § 796.

[44] People v. Canal Board, 55 N. Y. 390; Greene v. Mumford, 5 R. I. 472; Lane v. Schamp, 5 C. E. Green, 82.

[45] Hartford Fire Ins. Co. v. Doyle (U. S. Cir. Ct. Wis.), 3 Cent. L. J. 41.

[46] Conn. River R. R. Co. v. Co. Comrs., 127 Mass. 50; Arberry v. Beavers, 6 Tex. 457; S. C., 55 Am. Dec. 791.

[47] People v. Hoyt, 66 N. Y. 606; Trustees v. State, 11 Ind. 205; Drexel v. Berney, 14 Fed. Rep. 268; Hanley *et al.* v. Wetmore *et al.* (S. Ct. R. I.), 6 Atl. Rep. 777; High on Ex. Leg. Rem., § 10; High on Inj., § 8; State v. Hollinshead, 2 Atl. Rep. 244.

imprison legislators for doing what the law directs them to do. Courts will not issue writs of injunction where they would be unavailing. "It is a principle of constitutional law, declared in our constitution, and enforced by many decrees of our own and other courts, that the departments of government are separate and distinct, and that the officers of one department shall not invade any other. To interfere by injunction in this case would involve a violation of this fundamental principle. The general assembly has power to compel the production of papers necessary to enable it to justly and intelligently discharge its duties and exercise its functions. If the judiciary should enjoin the secretary of state from delivering the papers described in the complaint, and the general assembly should demand their delivery to the officer to whom they are addressed, a conflict of authority would arise which no tribunal could effectually determine."[48] The courts having no jurisdiction over the subject-matter in such a case, mere consent on the part of the officer will not give them jurisdiction to grant the relief sought.[49]

The courts have often been asked to interfere by *mandamus* or injunction in contested election cases, but, in accordance with the rules and principles hereinbefore stated, they have almost unanimously refused to interfere, when the title to an office would be involved.[50] The legal right is seldom clear in such cases; there is, generally at least, an adequate remedy by *quo warranto*, and to award a *mandamus* or an injunction, even if the court had jurirdiction, would, in many cases, be utterly vain and futile.[51] But *mandamus* has frequently been resorted to with success by one holding a commission and *prima facie* entitled to an office, for in such a case the question of title is not necessarily put in issue by him, and may, perhaps, not be in any way involved.[52]

There is little difficulty in cases where the office is not already filled by one claiming title, but where there is an incumbent who claims title to the office and denies the right and title of the new claimant, a more difficult question is presented. Mr. Moses states the rule generally that no *mandamus* will issue in the latter case.[53] Mr. High attempts to distinguish between the cases of the latter class, and lays down the rule that, where the claimant simply seeks to be restored from an office already, held by him, but from which he has been ousted, *mandamus* will lie.[54] Perhaps the true ground of distinction is that stated by the editor of the American Decisions, namely: "If the applicant can show a clear *prima facie* legal title to the office, and if the contest involves merely the determination of a simple question of law, the writ will be awarded whether the office is filled at the time or not, and without reference to the question whether the applicant has previously occupied it. But the court will not enter upon any investigation of fact, and will not undertake to adjudicate and enforce a doubtful right. It will not go behind the certifiate, commission, or other declaration of title to the office, issued or made by the proper authority, to inquire into the ultimate right."[55]

Indianapolis, Ind. W. F. ELLIOTT.

[48] Smith v. Myers, Sup. Ct. Ind. (MS.) Jan. 4, 1887.

[49] Smith A. Myers, *supra;* State *ex rel.* v. Dike, 20 Minn. 363; People *ex rel.* Sutherland v. Governor, 29 Mich. 320; s. c., 18 Am. Rep. 89, opinion 96. But see People v. Bissell, 19 Ill. 229; s. c., 68 Am. Dec. 591.

[50] Meredith v. Supervisors, 50 Cal. 433; State v. Auditor, 34 Mo. 375; People v. Frazier, Breese (Ill.), 68; Warner v. Myers, 4 Oreg. 72; Matter of Gardner, 68 N. Y. 467; People v. Treas., 36 Mich. 416; Dalton v. State *ex rel.* Richardson (S. Ct. Ohio), 11 Am. & Eng. Corp. Cas. 78; State v. Dunn, Minor. 46; s. c., 12 Am. Dec. 25, and authorities cited in note 29; High Ex. Leg. Rem., § 49; Moses on Mandamus, 49; Injunction Cases: Kilpatrick v. Smith, 77 Va. 347; Delahanty v. Warner, 75 Ill. 185; s. c., 20 Am. Rep. 237; Markle v. Wright, 13 Ind. 548; Beal v. Ray *et al.*, 17 Ind. 554; Gilroy's Appeal, 100 Pa. St. 5; Foster v. Moore, 32 Kans. 483; 2 High on Inj. (latest ed.), § 1312, and authorities there cited.

[51] Fitch v. McDiarmid, 26 Ark. 482; Hanley v. Wetmore, 6 Atl. Rep. 777: Sharlburne v. Horn, 45 Mich. 160; Howard v. Gage, 6 Mass. 462; Woodbury v. Comrs., 40 Me. 304.

[52] Lewis v. Whittle, 77 Va. 425; Strong's Case, 20 Pick. 484; State v. Watertown, 9 Wis. 254; Curtis v. McCullough, 3 Nev. 202; *Ex parte* Diggs, 52 Ala. 381. And see note to State v. Dunn, 12 Am. Dec. 25, 29, and authorities there cited.

[53] Moses on Mandamus, 150.

[54] High Ex. Leg. Rem. §§ 46, 67.

[55] Note to State v. Dunn, 12 Am. Dec. 25, 30.

PAYING HALF A DEBT FOR THE WHOLE.

Though justices of the peace (in England) do not often require to consider the law of debtor and creditor, except when perhaps an

indignant creditor insists on ringing the bell or otherwise molesting or threatening the defaulting debtor in his own house, and an assault is perpetrated or there is fear of it, yet there are cases where we are all intensely interested in knowing how a debt can be most easily got rid of. We are all debtors and creditors in turn, and hence have all an interest in knowing how we may be served or how we can serve others, according to the situation we fill at the moment. We think there is one case with which we all have had some occasion to be familiar, and that is where somebody owes us a debt and we have immense difficulty in getting it in or even getting an installment. Some debtors have most dishonest ways of wearing out the patience of their creditors, till the latter are driven to desperation, and often come to think that half a loaf is better than no bread. Debtors sometimes systematically worry their creditors in this way with the expectation that,in the end, they will get quit of their liability by paying at most only a half of the debt. After great delay and many fraudulent representations of their impending insolvency they thus in effect coolly propose to pay 10s. in the £1, on the understanding that they shall get a receipt in full. It is a sort of constructive bankruptcy they play off upon us, and without themselves going through the form of being adjudicated bankrupts, this class of debtors get all the benefit of a bankruptcy and palm off upon us a composition. Some of the smaller creditors, as justices of the peace have occasion to know, often resort to violence or threats in order to compel an immediate payment of their little bill, and there are great hardships experienced by the withholding of a just payment of these small debts. We rather think also that many landlords, in order to get rid of a tenant or lodger who causes great trouble and seems hopelessly insolvent, are glad to pay him out, as it were, by giving him a small sum to leave peaecably, rather than wait to be paid by him and thus put an end to the endless delay and never ending excuses for non-payment. These are common occurrences in nearly every grade of society, and yet there are most mysterious and subtle doctrines surrounding the law relating to payment of part of a debt instead of the whole. The minds of judges have been greatly exercised on this subject for many years past, and a decision of the House of Lords seems to have reviewed all these subleties, though probably not to have ended them.

In the case of Cumber v. Wane,[1] it was laid down that a debt is not satisfied by the receipt of a security of equal degree for a smaller sum. And in the leading case of Sibree v. Tripp,[2] it was remarked by Alderson, B., that payment of a portion of a liquidated demand is payment only in part, because it consists of two bargains, viz.,payment in part and an agreement without consideration to give up the residue. And Parke, B., said that it was clear that, if the claim be a liquidated and ascertained sum, payment of part cannot be satisfaction of the whole. If the contract be by bond or covenant it can be determined only by something of an equal or higher value; but upon a mere simple contract it is clear that the debtor may give anything of inferior value in satisfaction of the sum due, provided it be not part of the sum itself. The result of this decision was, that you cannot get a stisfaction or discharge of a debt of £10 if you pay only £5, though you may do so if you give something else than money.

The reason of this distinction is not self-evident, but it is important to know that there has long been such a well-established distinction. It was brought out by Jessel, M. R., in a very emphatic way and made almost comic by that masterly judge in the recent case of Couldery v. Bartrum.[3] The question there arose out of an alleged composition accepted for a larger sum by the creditor, and the master of the rolls thus explained the legal difficulty. He said that, according to English common law, a creditor might expect anything in satisfaction of his debt except a less amount of money. He might take a horse or a canary or a tomtit, if he chose, and that was accord and satisfaction. But by a most extraordinary peculiarity of the English common law he could not take 19s. 6d. in the pound; that was *nudum pactum*. Therefore, although the creditor might take a canary, yet if the debtor did not give him a canary, together with his 19s. 6d., there was no accord and satisfaction; if he did, there was accord and satisfaction. That was one of the mysteries of English common law.

[1] Str. 426.
[2] 15 M. & W. 23.
[3] 19 Ch. D. 394.

The learned judge then went on to show that there came a class of arrangements between creditors and debtors, by which a debtor who was unable to pay in full offered a composition of something less in the pound. It was held to be a very absurd thing that the creditors could not bind themselves to take less than the amount of their debt. There might be friends of the debtor who would come forward and pay something towards the debts; or it might be that the debtor was in such a position that if the creditors took less than their debts he would have something over for himself, and would exert himself to pay the dividend: whereas, if the creditor did not, they would get nothing or less than nothing if they incurred costs in endeavoring to get payment. Therefore, it was necessary to bind the creditors; and as every debtor had not a stock of canary birds or tomtits or rubbish of that kind to add to his dividend, it was felt desirable to bind the creditors in a sensible way by saying that, if they all agreed, there should be a consideration imported from the agreement constituting an addition to the dividend, so as to make the agreement no longer *nudum pactum*, but an agreement made for valuable consideration, and so that there could be satisfaction.

Such was the lively description of the way in which creditors of a bankrupt came to accept payment of part of their debt as full satisfaction. But there still remained an uncertainty as to the kinds of agreement which exists between debtor and creditor, when the debtor sends part of the debt by check and annexes a sort of condition to it, such that he expects or requires a full discharge of the whole debt. And then there was another case which often happens, namely, where the two parties do not quite agree as to the amount of the debt, and the debtor sends what he thinks enough and demands a receipt in full. The next case which occurred was Goddard v. O'Brie ,[1] which, however, contains no reference to the case of Coulderly v. Bartrum. It was a case where the defendant bought billiard table slates from the plaintiff for £125. One day one of the plaintiff's firm met the defendant and agreed to take £100 in discharge of the whole debt, whereupon the defendant gave a check for £100, and and a receipt was given which said that the £100 was to be in settlement of the account. But there was no consideration given for the balance due by the defendant. The plaintiff afterwards sued for the balance, and the question was whether the payment of £100 by check was a good discharge under the agreement. The county court judge held that it was, and the Queen's Bench Division held the same thing. The court again said that it was a singular state of the law that, though payment of part only of the debt in cash would not be a good discharge, yet if the part payment were by check or something else than cash, it would be a good discharge. The doctrine was said to be that a creditor cannot bind himself by a simple agreement to accept a smaller sum in lieu of an ascertained debt of larger amount, such an agreement being *nudum pactum*. But if there be any benefit, or even any legal possibility of benefit to the creditor thrown in, that additional weight will turn the scale, and render the consideration sufficient to support the agreement.

The next case has occasioned much litigation on the same doctrine, but having reached the House of Lords, and the other cases having been there reviewed, may be considered as of the highest authority. In Foakes v. Beer,[5] the debtor, Foakes, was sued by Beer, and judgment obtained for £2,090. It was there agreed in writing not under seal that, if payment should be made of £500 in cash and half-yearly installments being duly paid for the rest, the plaintiff would not take any proceedings on the judgment. The whole of the installments due under this agreement were paid, but there was an additional sum of £300 due for interest, and for this the plaintiff sued. The judge held that the plaintiff was not entitled by reason of the agreement to issue execution for anything on the judgment. The Queen's Bench Division agreed with the judge. One of the latter judges said that the doctrine of English law on the subject of taking a smaller sum by way of satisfaction of a larger debt was a reproach to that law, and founded on a mere technicality. In this case the debtor wanted time, and the creditor was willing to give it, and the terms were sufficient to amount to a consideration. The first court, therefore, held the agreement binding. But on appeal the court of appeal reversed this decision, on

[1] 9 Q. B. D. 37.

[5] 9 App. C. 605.

the ground that such an agreement to take part for the whole debt was not binding, and hence that the creditor was entitled to issue execution for the interest. Brett, L. J., said that, though the plaintiff agreed to give time, she might at any time have changed her mind and was not bound, because there was no consideration for such an agreement. The case, therefore, passed in the court of appeal as one of the simplest kind, and occupied little time, but there was afterwards an appeal to the House of Lords, and all the authorities were there reviewed. It was urged by the debtor that it was every-day practice for tradesmen to take less in satisfaction of a larger sum, and give discount where there was neither custom nor right to take credit. This was common sense, and ought to be held also good law.

But the law lords treated this as a very important case, and took time to consider their judgment. Their judgment in the end was that the court of appeal was right in holding it to be a bad defense, that the creditor agreed to take less for his debt, unless that agreement was under seal. The lord chancellor said this had been the law of England for no less than 280 years, and it was too late to disturb it. Lord Coke had said it was so laid down by all the judges of the common pleas in Pinnell's Case.[6] The lord chancellor justified the rule as being founded on the distinction between the effect of a deed under seal and an agreement by parol or writing not under seal. This distinction may be arbitrary, but it was part of the law of England. Moreover, it was not unreasonable or practically inconvenient that the law should require particular solemnities to give a gratuitous contract the force of a binding obligation. It might be proper enough to alter the law in this respect, but it was impossible, without refinements which practically altered the sense of the word, to treat such a release or acquittance as supported by any new consideration proceeding from the debtor. And the lord chancellor seemed to treat it as an untenable distinction that the part payment was made by check or other security and not in cash. Consequently several intermediate authorities may be considered now to be overturned, and the broad doctrine placed on the distinction between contracts under seal and contracts not under seal.

Though the House of Lords consisted of four judges who were unanimous in restoring the old authority of Lord Coke's case, yet it is to be noticed that all the law lords were dissatisfied with the doctrine, and seemed willing to have it altered. Lord Blackburn was anxious at once to overrule the case reported by Coke, and Lord Fitzgerald said he would have willingly assisted in overturning it, but thought it had been too long established. Lord Blackburn had submitted reasons for altering the law, but the other law lords would not agree. He was, therefore, outvoted, and had to acquiesce. But he still held that Lord Coke make a mistake of fact when he laid down the law. And the reason for so thinking was said by Lord Blackburn to be, that all men of business, whether merchants or tradesmen, do every day recognize and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. Even where the debtor is perfectly solvent and sure to pay at last this often is so, and where the credit of the debtor is doubtful it must be more so.

The result is a remarkable example of all the business people insisting on the convenience and reasonableness of taking half a loaf rather than lose the whole loaf, and the court saying that such a course is not binding and probably quite foolish; and yet nobody seems a penny the worse for disregarding the strict law now laid down by the House of Lords.—*Justice of the Peace, Eng.*

[6] 5 Rep. 117*a*.

ACTION FOR ACT CAUSING DEATH—SELLING LIQUOR TO PERSON HELPLESSLY DRUNK—CONTRIBUTORY NEGLIGENCE IN DRINKING.

KING V. HENKIE.

Supreme Court of Alabama, December 9, 1886.

1. The personal representative of a deceased person cannot, under the statute authorizing an action to be brought for a wrongful act of omission causing the death of another (Code, § 2641), maintain an action against a retailer of intoxicating liquors, who sells or gives them to a man of known intemperate habits, who is helplessly drunk at the time, and the drinking of which causes his death almost instantaneously.

2. Where the negligence of a person killed has contributed proximately to the fatal injury, no action can be maintained by his personal representative under the statute, because the deceased himself would not have been entitled to recover had the injury not proved fatal; and in this case, the proximate cause of the death will not be so much referred to the *selling* of the liquor, as to the *drinking*—the act of the deceased.

3. If a person by his own voluntary or negligent act, not by the persuasion or coercion of another, becomes helplessly drunk, and while in such condition purchases and drinks liquor, the effect of which produces death, it not appearing that the seller could, by the exercise of ordinary care, or means at hand, have avoided the consequences which almost instantly followed, he would be guilty of such contributory negligence as would prevent a recovery had not death ensued, or defeat an action by his representative.

Appeal from Colbert circuit court.

The opinion states the facts of the case.

SOMERVILLE, J., delivered the opinion of the court:

The question raised for our decision, by the ruling of the court below on the demurrer to the complaint is, whether, under the provisions of section 2641 of the present code, 1876, authorizing an action to be brought for a wrongful act or omission causing the death of another, the personal representative of the deceased person can maintain an action against a retailer of intoxicating liquors, who sells or gives them to a man of known intemperate habits, who is helplessly drunk at the time, the drinking of which causes his death almost instantaneously.

1. The statute under which the action is brought provides that, "when the death of a person is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action against the latter at any time within two years thereafter, if the former could have maintained an action against the latter for the same act or omission, had it failed to produce death, and may recover such sum as the jury deem just." The remainder of the section providing how the amount shall be distributed and for the survival of the action against the personal representative of the wrong-doer, does not affect the question under consideration, and need not therefore be particularly referred to by us. Code 1870, § 2641.

The selling or giving away of spirituous, vinous, or malt liquors, in any quantities whatever, to persons of known intemperate habits, except upon the requisition of a physician for medicinal purposes, is, in this State, made a misdemeanor, and a license to sell or retail affords no protection to the guilty party. Code 1876, § 4205.

The foregoing section of our code (§ 2641), like many similar statutes in other American States, was evidently modeled after what is commonly known in England as Lord Campbell's Act, 9 and 10 Vict. ch. 93, enacted by the British parliament in the year 1846. The language there used was that, "whensoever the death of a person shall be caused by (any) wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable, if death had not ensued, shall be liable to an action for damages, nothwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

2. The purpose of this and like legislation was clearly to correct a defect of the common law, by which it was well settled that a right of action, based on a tort or injury to the person, died with the person injured. Under the maxim, "*actio personalis moritur cum persona*, the personal representative of a deceased person could maintain no action for loss or damage resulting from his death. Hallenbach v. Berkshire, R. Co., 9 Cush. 480; Quinn v. Moore, 15 N. Y. 436. The reason for the rule was said by Baron Parke, in a case arising before him under the English statute, to be that, in the eye of the common law, "the value of life was so great as to be incapable of being estimated by money." The rule probably, however, rests on a broader basis.

3. These statutes, it will be observed, each give a right of action only in cases where the deceased himself, if the injury had not resulted in his death, might have sustained a recovery. They continue, in other words, for the benefit of specified distributees "a right of action which, at common law, would have terminated at the death, and enlarge its scope to embrace the injury resulting from the death." Cooley on Torts, 264.

4. The condition that the action must be one which could have been maintained by the deceased had it failed to produce death, or had not death ensued, has no reference to the nature of the loss or injury sustained, or the person entitled to recover, but to the circumstances attending the injury, and the nature of the wrongful act or omission which is made the basis of the action. Saunders on Negligence, 219; South & North Ala. R. R. Co. v. Sullivan, 59 Ala. 272, 281. As said in Whitford v. The Panama R. Co., 23 N. Y. 465, where a similar phrase in the New York statute was construed, it "is inserted solely for the purpose of defining the kind and degree of delinquency with which the defendant must be chargeable in order to subject him to the action."

5. It necessarily follows, and has been accordingly decided with great uniformity by the courts, that, where the negligence of the person killed has contributed proximately to the fatal injury, no action can be maintained by his personal representative under the statute, because the deceased himself would not have been entitled to recover had the injury not proved fatal. Cooley on Torts, 364; Saunders on Neg. 213; 1 Addison on Torts (Wood's ed.) p. 621, § 572; Savannah, etc. R. Co. v. Shearer, 58 Ala. 675.

6. We first observe, that the case made by the

complaint does not seem to us to fall within the letter or spirit of the statute, and the court below so decided on the demurrer. The death of the deceased was not "caused" so much by the wrongful act of the defendants in selling him the whiskey, as by his own act in drinking it after being sold to him. The only wrongful act imputed to the defendants was the selling, or giving, as the case may be, of intoxicating liquors to the deceased while he was in a stupidly drunken condition, knowing that he was a man of intemperate habits. It is not shown that the defendants used any duress, deception, or arts of pesuasion to induce the drinking of the liquor. The act, however, as we have said, was a statutory misdemeanor. But this was only the remote, not the proximate or intermediate cause of the death of plaintiff's intestate. The rule is fully settled to be that, "if an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote." Cooley on Torts, 68-69; 1 Addison on Torts, 12-13; §§ 10-11. The statute under consideration was not intended to annul, but rather to preserve this rule of the common law, so necessary to the certainty and justice of its administration, that there must be some proximate connection between the wrong done and the damage claimed to result from it—that the two must be sufficiently conjoined so as to be "concatenated as cause and effect," as often said. Had it not been for the drinking of the liquor after the sale, which was a secondary or intervening cause co-operating to produce the fatal result, and was the act of deceased not of defendants, the sale itself would have proved entirely harmless. Hence, it cannot be said that the wrongful act of the defendants in making the sale caused the death of King, but rather his own act in drinking it. And this must be true, whatever the condition of his mind, or state of his intellect, and without regard to the question of any contributory negligence on his part. The case, we repeat, is one not covered by the statute.

7. The plaintiff is, moreover, in our opinion, debarred from recovery by the contributory negligence of the deceased, even admitting that the wrongful act of the defendants caused the death of King. It is shown that the deceased was helplessly drunk when he purchased and drank the liquor, so much so as to render the exercise of ordinary care by him impracticable, if not impossible. The presumption is that this condition was brought about by his own voluntary or negligent act, not by the persuasion or coercion of another. If we admit that the state of mind thus produced was analogous to that of one *non compos*, or insane, that the deceased was in mental darkness and so unconscious as to be at the moment incapable of knowledge or consent, thus rendering him morally unaccountable, yet the fact confronts us that this condition was the result of his own negligence or wantonness, and without it the accident of his death would not probably have occurred. The deceased, by the exercise ordinary care, might have escaped making himself helplessly drunk. By not doing so he was the author of his own death, in view of the fact that it does not appear that the defendants, after the fatal draught was taken, could, by the exercise of ordinary care, or even by any practicable means at hand, have avoided the consequences of death which almost instantly followed. This involved every element of contributory negligence, and was sufficient to prevent a recovery by the deceased, had death not ensued. Railway Accident Law (Patterson), 74; Illinois Cent. R. Co. v. Cragen, 71 Ill. 177; Cramer v. Burlington, 42 Iowa, 315; Whart. on Neg. § 332.

¶ 8. We have thus hypothetically admitted the contention of appellant's counsel that one drunk to unconsciousness is to be placed upon the same ground as infants of tender years, persons *non compos*, or insane, so far as concerns the question of plaintiff's contributory negligence. The contrary of this, however, would seem to be true, as the basis of the rule governing the latter classes is that of moral accountability. Imbeciles, lunatics, and infants are not accountable morally for the status of their minds, and yet the law governing the subject of contributory negligence, even as applicable to them, is admitted to be in a very unsatisfactory and doubtful state. Cooley on Torts, 680-682. A drunkard, or one in a state of voluntary intoxication, can scarcely claim so much charity from the law in this particular as imbeciles and lunatics, because he has his own agency, either wantonly or negligently, brought about his own misfortune. As drunkenness is no excuse for crimes, or for torts, no more should it be a basis for the legal liability of another in an action brought againt him by the victim of such inebriety.

9. The case of McCue v. Klein, 60 Tex. 168; s. c., 48 Amer. Rep. 260, referred to by appellant's counsel as an authority to support the present action, although analogous, to it in some respects is broadly distinguishable from it in one important particular. There the death of the deceased was brought about by the defendants conspiring together to induce and persuade the deceased to swallow a large amount of whisky, he being already so drunk as to be deprived of his reason and to be rendered incapable of resistance, the draught being thus inposed upon him in his helpless condition. The case was made to rest on the ground that the administration of the deadly draught, like that of a noxious drug, was an assault, the deception by which it was accomplished being a fraud on the party's will, equivalent to force in overpowering it. Com. v. Stratton (114 Mass. 303), 19 Amer. Rep. 350.

The demurrer to the complaint was, for the

foregoing reasons, properly sustained, and the judgment of the circuit court must be affirmed.

NOTE.—The foregoing case is to be distinguished from cases which are brought under dram shop acts so called, providing that any person who shall be injured in person or property by the intoxication of another, may recover damages for the injury he has suffered from the liquor-seller. An example of such statutes is Illinois Rev. Stat. 1874, ch. 43, entitled "Dram Shops." The right of recovery under such statutes is directly controlled by the terms of the statutes themselves. The case in the text is brought under a statute of a very different kind. In England, by Lord Campbell's act, passed in 1846, and in this country, by the statutes of every State in the Union,[1] following the Campbell act, the common law has been so modified that an action lies by the representative of a deceased person for an injury inflicted upon him in those cases in which he might have maintained an action himself if the injury had not amounted to death. The case in the text is brought under one of these statutes. In such a case, the requisites of a cause of action, by the very terms of the statutes, include all the requisites of a cause of action in an ordinary action for a personal injury. These requisites may be briefly stated to be: 1. That defendant has committed an unlawful act or omission. 2. That a personal injury has been suffered. 3. That such injury was the *natural* and proximate effect of the unlawful act or omission. The unlawful act may be one specifically prohibited, or one committed with no intent to injure, but without due care for others' rights; or one committed with intent to injure, but without the right to do so. All this is elementary law, and requires no citation of authorities to support it. But the word natural, as used above, requires explanation. It means foreseeable, as probable by an average person. In other words, if the unlawful act and the injury are not known by common experience to occur usually in sequence, no action lies.[2] The rule, *supra*, stating the requisites of a cause of action is limited by the further rule, that a cause of action does not subsist if the injured person's own act or omission materially contributed to his injury, and the defendant did not intend to injure.[3] It is noticeable that the Alabama court, in its decision, does not allude to the branch of the rule of recovery which requires plaintiff to prove that the injury was the natural effect of the unlawful act, which, in this case, was giving liquor to a helplessly intoxicated person. Immediate death is not the natural effect of giving a single drink of liquor to a helplessly intoxicated person, using the word natural as before defined; and it would seem that the court might properly have rested its decision that defendant was not liable, on the absence of this requisite of a cause of action. The court did rest its decision on the ground that the death was not the proximate effect of the unlawful act, and on the ground that the contributory negligence of deceased barred a recovery. The first of these grounds seems hardly tenable. A very short interval of time elapsed between defendant's giving deceased the liquor and his death, and defendant, when he gave the liquor, must have foreseen, as almost inevitable, that deceased would drink it. Whoever does an unlawful act is liable for all the consequences which may ensue in the natural course of events, although such consequences be immediately and directly brought about by intervening causes, if such intervening causes were set in motion by the original wrong-doer.[4]

Where a druggist carelessly labels a deadly poison as a harmless medicine, and the poison, so labeled, after passing through many intermediate sales, finally reaches the hands of one who, without fault, uses it as a medicine, and is injured thereby, the druggist is liable for the result of his negligence, notwithstanding the number of intermediate sales.[5] The second ground relied upon by the court, *i. e.*, contributory negligence of deceased, is more satisfactory. While intoxication is not, *per se*, and, as a matter of law, negligence, yet drunkenness will never excuse one from exercising the measure of care which is due from a sober man under the same circumstances.[6] Intoxication will not excuse one crossing a railway track from the exercise of such care as is due from a sober man.[7] Purchasing and drinking liquors by decedent does not constitute contributory negligence so as to bar recovery in a suit by his representative where decedent bought liquor from defendant, drank of it until he became unconscious, and in that condition was expelled from defendant's saloon, late at night, and died from the consequent exposure.[8] Neither is it contributory negligence to sell liquor to a man who, when made drunk by it, does you an injury.[9]

Chicago, Ill. RUSSELL M. CURTIS.

1 Beach on Contributory Negligence, § 20.

2 Bigelow on Torts, pp. 307, 312; Cooley on Torts, p. 69; Thompson's Leading Cases on Negligence, pp. 1064, 1084.

3 Beach on Contributory Negligence, § 20; Weeks on *Damnum Absque Injuria*, § 26, citing Willetts v. Company, 13 Barb. 585; Penn. Co. v. Ogier, 35 Pa. St. 60; North Pa. R. Co. v. Robinson, 44 Pa. St. 175; Tucker v. Chaplin, 2 Car. & K. 730. As to limitation as to defendant's intent, see Weeks on *Damnum Absque Injuria*, § 120.

4 Thompson's Leading Cases on Negligence, p. 1084.

5 Thomas v. Winchester, 6 N. Y. 397.

6 Beach on Contributory Negligence, § 146. Accord: Alger v. Lowell, 3 Allen, 402; Robinson v. Pioche, 5 Cal. 460; Thompson's Leading Cases on Negligence, note, p. 480, note, p. 1203.

7 Beach on Contributory Negligence, p. 204; Kean v. Baltimore, etc. R. Co., 61 Md. 154; Toledo, etc. R. Co. v. Riley, 47 Ill. 514; Chicago, etc. R. Co. v. Bell, 70 Ill. 102; Varnall v. St. Louis, etc. R. Co., 75 Mo. 575; Southwestern R. Co. v. Hankerson, 61 Ga. 114; Houston, etc. R. Co. v. Sympkips, 54 Tex. 615; Herring v. Wilmington, etc. R. Co., 10 Ired. (Law) 402; Jones v. North Carolina R. Co., 67 N. C. 125; Little Rock, etc. R. Co. v. Parkhurst, 36 Ark. 371; Ill. Cent. R. Co. v. Hutchinson, 47 Ill. 408; Thompson's Leading Cases on Negligence, note, p. 1174. Accord: Haley v. Company, 21 Iowa, 15.

8 Weymire v. Wolfe, 52 Iowa, 533.

9 Cassady v. Magher, 85 Ind. 228.

DEED ABSOLUTE—WHEN A MORTGAGE—CALIFORNIA STATUTE—INADEQUATE CONSIDERATION—EVIDENCE—ACCOUNTS.

HUSCHEON v. HUSCHEON.

Supreme Court of California, December 18, 1886.

1. *Deed Absolute—Mortgage—California Statute—Evidence.*—Under the statute law of California, a deed absolute of land, designed to secure payment of money, is a mortgage, and the fact that it is subject to a defeasance may be proved, if it does not appear on the face of the paper.

2. *Evidence—Inadequacy of Consideration — Preponderance of Proof.*—Gross inadequacy of consideration tends to prove that a deed, absolute on its face, was intended as a mere security for money, and such inadequacy may be proved, together with the fact that a defeasance, subsequently lost, was executed at the same time the deed was executed, together with other facts and circumstances tending to support the theory that the deed was intended to operate only as a mortgage.

3. *Mode of Accounting.*—When a deed has been declared a mortgage, the accounts between the parties should be stated with allowance of interest on both sides, the mortgagee charged with rents and profits of the land while under his control, and credited with money paid for taxes and improvements on the property, and a reasonable compensation for his services.

BELCHER, C. C., delivered the opinion of the court:

By this action the plaintiff seeks to have a deed, executed by him to defendant, adjudged to be a mortgage; and the facts of the case, as found by the court below, are substantially as follows:

On the fifteenth day of July, 1876, plaintiff was the owner of 760 acres of land in Humboldt county, of the value of $4,000. He was indebted to one Margaret Fitzgerald in the sum of about $500, for which an action had been commenced against him, and his property attached. He had been a partner with one Comise in the dairying business, and Comise was claiming that a considerable amount was due him on partnership account, and was threatening to commence an action to settle up the partnership affairs. Plaintiff had no money, but it was necessary for him to be prepared to meet and settle these demands.

Under these circumstances he applied to the defendant, who was his brother, and in whom he placed great confidence, for assistance. Defendant agreed to pay the Fitzgerald note, and also to defend any action that might be commenced by Comise, and to pay all the cost and expense of such action, and any judgment that might be recovered therein, provided plaintiff would execute to him a conveyance of all his lands. Thereupon plaintiff executed and delivered to defendant a deed of his land, which was absolute in form. On the same day another paper was executed by the parties, which is now lost, but is called by some of the witnesses a lease, and by others a "back paper." By this paper it was, in effect, agreed that defendant should take and hold possession of the lands for six years, and that, at the expiration of that time, they should be reconveyed to the plaintiff, upon his paying to the defendant such sum or sums of money as might then be found due him. Under the agreement defendant took possession, and has ever since held it. A few days after receiving the deed he paid the Fitzgerald claim, amounting to the sum of $540, and thereafter, at divers times, paid out sums aggregating about $800, for costs and expenses incurred in the litigation between Comise and plaintiff, and to satisfy the judgment obtained by Comise in that litigation. After the expiration of the six years provided for in the agreement, plaintiff demanded from defendant an account of the rents, issues, and profits of the land, and of all sums of money due defendant, if any, and offered to pay him whatever sum might be found due; but defendant refused to account to or with plaintiff in any manner, and claimed to own all of said property absolutely. At that time the land had largely increased in value.

The action was commenced in January, 1883, plaintiff alleging in his complaint that the deed executed by him to defendant was intended to be, and was given and accepted as, security for the money to be paid for him by defendant, and praying that it be adjudged a mortgage; that an account of the dealings between them be taken; and that he be permitted to redeem the property so conveyed upon paying to defendant all sums of money found due him, if any, and for a reconveyance of the lands to him by defendant. Upon these facts, the court, by its judgment, granted to the plaintiff the relief demanded. The defendant then moved for a new trial, and, his motion being denied, appealed from the judgment and order.

In support of the appeal, it is now earnestly contended that the deed in question was an absolute conveyance in fact as well as in form, and that the finding of the court that it was only a mortgage is not justified by the evidence. In this State every transfer of an interest in real property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage; and the fact that the transfer was made subject to a defeasance may be proved, though it does not appear by the terms of the instruments. Sections 2924, 2925, Civil Code. Whether a deed absolute in form be a mortgage or not is a mixed question of law and fact, to be determined from all the evidence, written and parol; and, in determining it, all the facts and circumstances attending the transaction should be considered. If it were given as a security for a loan of money, a court of equity will treat it as a mortgage; and whether it was so given or not is the test by which its character must be judged. Farmer v. Grose, 42 Cal. 169; Montgomery v. Spect, 55 Cal. 352; Peugh v. Davis, 96 U. S. 332.

In the last-named case, Field, J., delivering the opinion, it is said: "It is an established doctrine that a court of equity will treat a deed absolute in form as a mortgage, when it is executed as a security for a loan of money. That court looks beyond the terms of the instrument to the real transaction; and when that is shown to be one of security and not of sale, it will give effect to the actual contract of the parties. As the equity upon which the court acts in such arises from the real character of the transaction, any evidence, written or oral, tending to show this, is admissible."

The debt to secure which the deed is given may be an antecedent debt, or one created at the time, or it may be advances to be there after made by the mortgagee to or for the mortgagor, and no accompanying written promise on the part of the mort-

gagor to pay the debt is necessary. Pioneer G. M. Co. v. Baker, 10 Sawy. 539; s. c., 23 Fed. Rep. 258; Campbell v. Dearborn, 109 Mass. 130, Russell v. Southard, 12 How. 139; 4 Wait, Act. & Def. 541, 542; Horn v. Keteltas, 46 N. Y. 605. One of the circumstances tending strongly to show that a deed absolute in form was only a mortgage, is the fact when it appears that there was great inequality between the value of the property conveyed and the price alleged to have been paid for it. As said in Russell v. Southard, *supra:* "In examining this question, it is of great importance to inquire whether the consideration was adequate to induce a sale. When no fraud is practiced, and no inequitable advantages taken of pressing wants, owners of property do not sell it for a consideration manifestly inadequate, and, therefore, in the cases on this subject, great stress is justly laid upon the fact that what is alleged to have been the price bore no proportion to the value of the thing said to have been sold;" citing Conway v. Alexander, 7 Cranch, 241; Morris v. Nixon, 1 How. 126; Vernon v. Bethell, 2 Eden, 110; Oldham v. Halley, 2 J. J. Marsh. 114; Edrington v. Harper, 3 J. J. Marsh. 354.

Tested by the foregoing rules of law, was the deed in question an absolute conveyance or a mortgage?

It is not pretended that the value of the property, when the deed was made, was less than $4,000, nor that there was any consideration for its execution except an agreement on the part of defendant to pay all of plaintiff's debts, including all claims then in litigation, or that might be brought against him. The amount to be paid on the Fitzgerald note was known to be only a little more than $500. The only other debt was the Comise claim, which was uncertain in amount; it might be nothing, or might be several hundred dollars. Taking both of the claims together, we are unable to see how it could have been anticipated that the defendant would be called upon to pay more than a thousand or twelve hundred dollars. The consideration for the deed was, then, altogether inadequate, and it seems quite incredible, that plaintiff would be willing to sell out all his property, even to his brother, for about one-fourth of its value.

Upon the question whether a paper in the nature of a defeasance was executed by the parties or not, the testimony was conflicting, and upon that subject we quote and adopt what was said by the court below, in deciding the case: "Aside from the consideration of inadequacy of price, I am entirely satisfied from the evidence that, at the time of the execution of the conveyance, it was not only agreed and understood between the parties that plaintiff should have the right to redeem upon the payment to defendant of all sums which he had paid for plaintiff, but I am also satisfied that there was at the same time executed by the parties an agreement to that effect. This writing has not been produced in court, and diligent search and inquiry have failed to discover it. It is lost or destroyed. The defendant denies most emphatically that such an instrument was ever executed. He admits that there was some talk about it; that plaintiff wanted such a writing, but that he, the defendant, positively refused to execute it. In my opinion, the evidence as to the execution of this paper is so overwhelming as to place it beyond all doubt. The plaintiff swears positively to it, gave his reasons why he wanted it, testifies circumstantially to the reading of it by Watson in the presence of Walsh, himself, and defendant, of his signing it, and defendant attaching his mark, being unable to write; also as to the controversy between them as to the duration of the lease, as it was called, or the time within which he should be allowed to redeem; and finally, at the suggestion of Walsh, fixing the term at six years. Incidently, it appears that he spoke of it to a number of parties at various times; sometimes calling it a bond for a deed, sometimes a lease, and sometimes using the homely but expressive term, a 'back paper.' The testimony of Walsh as to the execution of the paper is clearer and more satisfactory than that of the plaintiff. He was the mutual friend of the parties, and they consulted and advised with him, and discussed the matter in his presence, and adopted his suggestion in fixing the duration of the lease at six years. He heard it read by Watson to the parties, heard them express their satisfaction at its contents, saw plaintiff sign his name, and defendant make his mark; before this having sent them to Watson to get him to write it. He subsequently read it over himself, and kept it for about a year in his safe. He is quite certain that some one obtained it from him pending the Comise and Huscheon litigation. Watson remembers distinctly of writing two papers in which the parties were interested, and that Walsh had something to do with the negotiations, but fails to remember the contents or purpose. Walsh cannot testify minutely to all the terms of this lease, as he terms it, but does remember clearly that the purpose and object was to allow the defendant to use the land and stock for six years, the rents and profits to be applied in payment of plaintiff's indebtedness to him, and at the expiration of that time he was to deed back to plaintiff, upon the payment by him of the money expended in his behalf, if any should be due."

This is a fair review of the evidence, and, in our opinion, it correctly states its scope and meaning. It is true, it appeared that plaintiff had often spoken of the business relation existing between himself and defendant as that of a partnership, and that in a suit against the defendant, which involved the right to the personal property transferred, and was tried before a justice of the peace in 1877, he was a witness, and testified that he had no interestin the personal property, and incidentally that he had none in the land. But we do not consider these facts of any particular importance. Plaintiff was an ignorant man, and may well have supposed that the transaction established some kind of a partnership relation. So as to the testi-

mony before the justice. If plaintiff testified just as it is claimed he did, it may have been done honestly. He knew that he had deeded the land to defendant, and that defendant was in possession of it, and had a right to retain that possession for several years. Under the circumstances he may have supposed that he had no interest in the land then, and would have none until he had settled with defendant, and paid back to him all sums of money which had been or should be advanced for his benefit.

Looking, then, at all the testimony, we agree with the court below that it clearly and satisfactorily appears that the deed in question was given as a security for the repayment of moneys to be thereafter advanced by defendant, and that it should be held and treated as a mortgage.

It is also argued for the appellant that the deed was made to hinder and delay the creditors of plaintiff, and therefore he is entitled to and can obtain no relief from the courts against it. On looking through the record we are unable to find anything to support this claim. In his very able and exhaustive brief, counsel for appellant says that, as the consideration for the deed, "defendant agreed to pay all plaintiff's debts, including all claims then in litigation, or that might be brought against him." If this be so, how can there be any plausible pretense that,in making the deed,plaintiff intended to hinder, delay, or defraud his creditors? We, at least, are unable to see how a needy debtor can be said to have violated any rule of law or good moral, because, to raise money to pay his just debts, he has turned over all his property, as security, to some one, who has the ability, and has undertaken honestly and in good faith, to pay them.

Among other defenses interposed, defendant pleaded nearly all of the sections of the code providing for the limation of actions, and it is claimed that, under some one or more of these sections, plaintiff's cause of action is barred. If it be true, as found by the court, that defendant took and held possession of the land under a written agreement, which was executed by the parties, and provided, in effect, that plaintiff should have the right to redeem at the expiration of six years upon paying to the defendant whatever should then be found due him, it is quite clear that there could have been no adverse holding of the land, and that defendant cannot now avail himself of any of the sections of the code which provide bars against the recovery of real property. So, too, it is equally clear that the paper constituted a written recognition of the debt from plaintiff to defendant, and a promise to pay it when the right to redeem should accrue, and consequently that, if defendant had instituted an action to foreclose, plaintiff could not have availed himself of any of the sections of the code which provide bars against the recovery of money. It must follow, therefore, that the rights of the parties were reciprocal and commensurable, and that the court properly held that the action was not barred.

In stating the account between the parties the court credited defendant with all sums of money paid out by him for the plaintiff, and for taxes and improvements upon the property, and also with his expenses and a reasonable compensation for his time while attending to plaintiff's business, with interest on the said several sums at the rate ten per cent. per annum, but it refused to credit him with the money paid out for expenses in the lawsuit before the justice of the peace hereinbefore referred to; and it charged him with the value of the rents and profits of the land while he held possession of it, with the amount of a mortgage he had placed upon the land and not paid, and with the value of certain work and labor performed by plaintiff on another farm owned by defendant. As the accounts were thus stated it was found that the defendant had been fully paid, and that a balance of $217.30 was due the plaintiff, for which judgment was also entered in his favor.

It is now objected that the court erred in refusing to credit defendant with his expenses in the justice's court case, and in charging him with the rents and profits of the land, and for the work and labor of plaintiff. But in the rulings of the court upon these matters we see no material error. The action before the justice of the peace was brought by a third party against the defendant to recover the personal property, and it had no connection with the transaction in hand. The defendant was a mortgagee in possession,and chargeable with the rents and profits of the mortgaged premises (Ruckman v. Astor, 9 Paige Ch. 517; Strang v. Allen, 44 Ill. 428; 4 Wait's Act. & Def. 566, 577); and there was testimony tending to show that the value of the rents and profits was even greater than the amount allowed. The court, in effect, found that the services of the plaintiff were rendered in part payment of the sums advanced by defendant under the original agreement; and the testimony of plaintiff that he never made any separate contract about the work, and never expected defendant to pay him $25 per month in money for his work, but supposed he was working in the interest of the general partnership between them, is in support, we think, of the court's view of the matter.

The plaintiff seems to have thought that the transaction between himself and defendant created a partnership between them, and that he was working to discharge the duty cast upon him by that relation. He was mistaken about the partnership, but his work was nevertheless performed to release him from the burden of debt which the transaction had imposed upon him.

It followed that the judgement and order should be affirmed.

NOTE.—It is a well established doctrine that a court of equity will treat a deed absolute in form as a mortgage, when it is executed as security for an indebtedness.[1] In the case of Second Ward Bank v. Upmann

[1] Boone on Mortgages, § 38; Ortan v. Knab, 3 W

the court says: "An absolute deed of land and a contemporaneous bond by the grantee to reconvey on payment of a certain sum, constitutes a mortgage, both at law and in equity."[2] A court of equity will often pronounce that to be an equitable mortgage which, at law, would be considered a conditional sale.[3] An equitable mortgage may arise from non-payment of the purchase money from a deposit of title deeds, or from an unsuccessful attempt to make a valid mortgage deed.[4] In all doubtful cases, a court of equity will construe the conveyance to be a mortgage, rather than a conditional sale.[5] Where there is no debt or loan, an agreement to re-sell does not change an absolute conveyance into a mortgage.[6]

It is generally agreed that, in a court of law, parol evidence is inadmissible to show that an absolute deed of land was intended only as a mortgage.[7] But a court of equity, in the exercise of its peculiar jurisdiction, may allow it to be shown by parol evidence that the object of the conveyance, as intended and understood by the parties, was to create a security for a debt, and, therefore, a mortgage.[8] In accordance with this doctrine, the admissibility of parol proof to show a deed absolute on its face to be a mortgage has become an established rule in nearly every State,[9] and the same rule is declared by the Supreme Court of the United States.[10] But evidence of that kind must be clear and satisfactory.[11]

In the case of Kent v. Ardard, the court says: "On proof that a deed, absolute on its face, was intended as a mere security, it will be held a mortgage only, and that fact may be proved by parol evidence, either at law or in equity."[12] But it ought not to be adjudged without at least a preponderance of evidence to support it.[13]

In the case of Holmes v. Grant,[14] the court says: "And gross inadequacy of price is always a strong circumstance in favor of the supposition that a sale of the property was not intended. On the contrary, if the consideration paid is about the fair cash value of the property, the fact that there was no contract, the right of the mortgagor to an account of the rents and profits of the land, received by the mortgagee, is purely of equitable cognizance."[15] The mortgagee in possession takes the rents and profits in the *quasi* character of trustee or bailiff of the mortgagor.[16] It is generally true that a mortgagee in possession is bound to keep the premises in ordinary repair,[17] and he must account for the reasonable rental value of the premises, without regard to the net profits.[18]

In England, a mortgagee in possession cannot charge for personal services in caring for the estate, collecting rents, etc., unless it is necessary to employ a bailiff to transact the business;[19] but in this country compensation for personal services has been allowed.[20]

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Sweet v. Mitchell, 15 *Id.* 641; Holle v. Bailey, 58 *Id.* 434; Madigan v. Mead, 31 Minn. 94; Craig v. Jennings, 31 Ohio St. 24; Wooley v. Holt, 8 Reporter, 171; Bathell v. Syverson, 54 Iowa, 160; Omaha Book Co. v. Sutherland, 10 Neb. 336.

2 12 Wis. 499.

3 Boone on Mortgages, § 39; McNamara v. Culver, 22 Kas. 661; Second Ward Savings Bank v. Upmann, 12 Wis. 499; Boone on Real Property, § 225.

4 Gale v. Morris, 29 N. J. Eq. 222.

5 McNeill v. Norsworthy, 39 Ala. 156; Kent v. Lasley, 24 Wis. 654; Sears v. Dixon, 33 Cal. 326.

6 Glover v. Payn, 19 Wend. 518; Reading v. Weston, 7 Conn. 143, 409; 8 Conn. 117.

7 McClure v. White, 5 Minn. 178; Compare v. Service, 21 Wend. 36; Tillson v. Moulton, 23 Ill. 468.

8 Strong v. Stewart, 4 Johns. Ch. 167; Bryan v. Cowart. 21 Ala. 92; Russell v. Southard, 12 How. 147.

9 Hancock v. Harper, 86 Ill. 445; Campbell v. Dearbon, 109 Mass. 130; Horn v. Keteltas, 46 N. Y. 610; Kent v. Lasley, 24 Wis. 654.

10 Hughes v. Edwards, 9 Wheat. 489; Peugh v. Davis, 96 U. S. 332.

11 Schade v. Bessinger, 3 Neb. 145; Deroin v. Jennings, 4 *Id.* 99.

12 24 Wis. 378.

13 Butler v. Butler, 46 Wis. 430; Musgat v. Pumpelly, 46 *Id.* 660.

14 8 Paige Ch. 258; Wharf v. Howell, 5 Binney, 503; 3 Watts, 151, 198; 6 Metc. 482.

15 Seaver v. Durant, 39 Vt. 103; Given v. McCalmot, 4 Watts, 464; Parsons v. Wells, 17 Mass. 419.

16 Gibson v. Crehore, 5 Pick. 517; Hunt v. Maynard, 6 *Id.* 489.

17 Cumber v. Gilman, 15 Ill. 381; Barnett v. Nelson, 37 Am. Rep. 183; Campbell v. McComb, 4 Johns. Ch. 534.

18 Barnett v. Nelson, 37 Am. Rep. 183.

19 Chamber v. Goldwin, 5 Ves. 834; Davis v. Denby, 3 Madd. 170; Elmer v. Loper, 25 N. J. Eq. 475; Harper v. Ely, 70 Ill. 581.

20 Watermann v. Curtis, 26 Conn. 241; Gerrish v. Black, 104 Mass. 400.

WEEKLY DIGEST OF RECENT CASES.

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1. AGENCY—*Principal and Agent—Assignment by Agent of Contract in Principal's Name.*—In an action by the assignee of a contract of sale of a bridge, and for its erection, to recover the money due, where it appears that the assignment was made by the agent of the bridge company, and that the agent had the sole authority to sell the company's bridges in the State, and that he was authorized to sign contracts for the sale of bridges in the company's name, and then purchase the bridges from it, and erect them at his own expense, and receive all the profits, and it further appears that the money for the purchase and erection of the bridge described in the contract in suit was furnished by plaintiff, *held*, that the agent had authority to assign the contract.—*Smith v. Hubbard*, S. C. Tenn., Jan. 10, 1887; 2 S. W. Rep. 569.

2. —— —— *False Representations by Agent.*—An affidavit of defense to a suit on a note stated that said note was given in part payment of the

purchase money for a tract of land, that said purchase was made through A and B, who represented themselves to be the agents of plaintiff; that said A had made certain false representations and done certain dishonest acts (giving them specifically), whereby he was induced to go to Virginia to meet plaintiff and B; that he was there introduced to plaintiff by B, and that "the action of said B, in negotiating said sale for the owners, was approved and ratified;" that said B first brought defendant into personal contact with plaintiff, who acquiesced in all that A and B had done in effecting said sale. *Held*, that the affidavit was sufficient to send the case to a jury. If A were the agent, as the affidavit averred, the principal would be bound by his false representations, though not made in his presence.—*McFeely v. Little*, S. C. Penn., Jan. 31, 1887; 19 Weekly Notes Cases, 97.

3. —— —— *Liability of Agent to Third Persons —Possession under Bond after Sequestration.*—Libelants sue libellee, as on an implied contract, for the value of the use of a tug owned by libelants, and wrongfully used for a certain time by libellee. Libellee held the tug during the time in question as agent for L & N, who, having a mortgage on the the tug, caused her to be seized under a writ of sequestration, and afterwards duly gave bond and received possession of her. *Held*, that the libellee was only the agent of L & N, who only were liable, if any persons were.—*Baldwin v. Black*, U. S. S. C., Jan. 10, 1887; 7 S. C. Rep. 326.

4. ASSIGNMENT FOR BENEFIT OF CREDITORS—*Chattel Mortgage.*—An instrument by which a debtor conveys to one who is security for most of his indebtedness, and to whom he owes one debt directly, a stock of goods, with authority to sell them, and pay his own debt and certain enumerated debts for which he is security, returning the balance of the goods to the debtor, and which recites that it is intended as a morigage, is a mortgage, and not a general assignment, or subject to the provisions of the statute regulating general assignments, although the goods included under it embrace all the debtor's property, except some accounts conveyed, by a similar instrument, to the same person—*Waterman v. Silberberg*, S. C. Tex., Dec. 7, 1886; 2 S. W. Rep. 578.

5. ASSIGNMENT—*Contract of Sale—Action by Assignee—Notice to Debtor.*—A contract made by bridge commissioners of a county to pay a certain sum of money for a bridge described therein, and for the erection thereof, upon the completion of such bridge as fast as the money is collected by the tax collector, though not negotiable by the law-merchant, is assignable, and the assignment passes the title so that the assignee can sue thereon in his own name, and an assignment being indorsed on the instrument, and the instrument delivered to the assignee, the assignment is complete, and notice thereof to the commissioners is not necessary to hold them liable.—*Smith v. Hubbard*, S. C. Tenn., Jan. 10, 1887; 2 S. W. Rep. 569.

6. BENEVOLET SOCIETIES—*Odd Fellows' Society—Tenants in Common — Compelling Purchase of Furniture.*—A court of equity will not, at the instance of the minority, compel the majority of the owners of the furniture of an Odd Fellows' hall to purchase the interests of the minority therein, nor to remove and sell the same, and divide the proceeds among all the owners; it appearing that the furniture is being used for the very purpose for which it was originally purchased.—*Robbins v. Waldo Lodge, No. 12, I. O. O. F.*, S. J. C. Me., Jan. 17, 1887; 7 Atl. Rep. 540.

7. CARRIERS—*Of Live Stock—Special Contract—Delay in Transportation—Agreement for Notice —Validity of — What Answer must Show.*—A railroad company is liable for delay in transporting cattle accepted by it for carriage, regardless of a special contract made with the shipper limiting its liability to injuries resulting from willful negligence. Whether an agreement between a railroad company, accepting cattle for shipment beyond its line, and the shipper, requiring the latter, as a condition precedent to his right to recover for any loss or injury, to give notice of his claim to some officer of the company, or its nearest station agent, before the removal of the cattle, is reasonable, and, therefore, binding on the shipper, depends upon whether the company had an officer or agent to whom notice could be given near the place of delivery; and an answer in an action against the company, setting up such contract, but making no allegation upon this latter subject, is demurrable.—*Missouri Pacific Ry. Co. v. Harris*, S. C. Tex., Dec. 17, 1886; 2 S. W. Rep. 574.

8. CONSTITUTIONAL LAW—*Navigable Rivers—Tonnage Duties—Ordinance of 1787—Illinois River—Construction of Dams and Canals—Tolls—What Kind Forbidden — Tolls Imposed According to Tonnage—Article 1, § 10, Const. U. S.*—The ordinance for the government of the territory of the United States northwest of the Ohio river, passed July 13, 1787, cannot control or limit the authority of a State after its admission; and the fourth section thereof, declaring that "the navigable waters leading into the Mississippi, and the carrying places between the same, shall be common highways, and forever free, * * * without any tax, impost, or duty therefor," does not incapacitate the State of Illinois to levy tonnage duties for a canal and dam it has constructed in improving the navigation of the Illinois river. It is no violation of the ordinance of 1787 for the State to construct dams and canals in the improvement of the navigation of a navigable river, since it does not thereby lose its character as a navigable stream. Nor to exact tolls for using the improvements, because the freedom from tax refers to the stream in its natural state. The ordinance did not contemplate improvements by artificial means; and for outlays caused by such works the State may exact a reasonable toll. A charge for services rendered is in no sense a tax or duty. The tax forbidden by the ordinance is a charge for the use of the government—not compensation for improvements. The fact that a surplus, not used in keeping the locks in repair, or in collecting the tolls, goes into the State treasury, does not alter the character of the toll as a compensation. Imposing the toll according to the tonnage of a vessel is not a violation of article 1, § 10, Const. U. S., prohibiting the imposing of a tonnage duty by any State without the consent of congress; such tonnage duty being a charge on a vessel according to its tonnage as an instrument of commerce for entering or leaving a port or navigating the waters of a State.—*Huse v. Glover*, U. S. S. C., Dec. 20, 1887; 7 S. C. Rep. 313.

9. CORPORATIONS—*Foreign Corporations—Books—New Jersey Statute.*—The New Jersey statute giving the courts of that State authority to require a foreign corporation to bring its books into the State, does not give such courts authority to require such corporation to bring in all their papers and *memoranda;* and when, on application of stockholders of the company for an order upon a cattle company to bring all books, papers, and *memoranda* of the company into court, it appears that the books of the company kept at its Philadelphia office have been before the court for a year, and also that the only other books of the company, kept at its ranches in the Indian Territory are kept in duplicate, and one set of the duplicates, sent regularly to the Philadelhia office, has also been so before the court, the petition will not be granted. —*Hulyar v. Cragin Cattle Co.*, Ct. Ch. N. J., Jan. 12, 1887; 7 Atl. Rep. 521.

10. —— *Municipal Coaporations—Bonds of Westminster — Floating Debt— Act Md. 1866, Ch. 176—Elections—Registration of Voters—Municipal Elections — Article 1, §5, Const. Md.* — The Maryland legislature had the power, under the constitution of the State,to pass the act of 1886, ch. 176, authorizing the mayor and common council of Westminster to fund the floating debt of the corporation, and to issue its bonds for that purpose. Article 1, § 5, of the constitution of Maryland, directing the general assembly to provide by law for a uniform registration of voters, has no application to municipal elections, except those held in the city of Baltimore.—*Smith v. Stephan*, Md. Ct. App., Jan. 4, 1887; 7 Atl. Rep. 561.

11. —— —— *Liability on Contract for Work to be Paid for by Special Assessment, where no Assessment was Levied.*—A city directed the making of a sewer by an ordinance reciting that it was in accordance with a petition of a majority of the property owners, and employed therefor an inspector, who duly performed his services. The cost of the sewer was to be paid by a special assessment. It afterwards transpiring that the petition was not signed by a majority of the property owners, the work was discontinued, and no assessment made. *Held*, that the city was liable on an implied guaranty that the petition was sufficient, and that the assessment would be levied.—*Bill v. City of Denver*, U. S. C. C., D. Col., Dec. 3, 1886; 29 Fed. Rep. 344.

12. COUNTIES — *Bridges—Acceptance by User—Approval by Viewers—Bridge Commissioners—Personal Liability.* — In an action against commissioners to recover the contract price of a bridge ordered by them, the defense cannot be made that the bridge, being a public one, constructed by a county, was not completed according to contract, when it appears that it has been used by the public for five years, and that jurors appointed by the county court to examine it approved it. In such an action, the defendants, being bridge commissioners appointed by the county, they are properly held personally liable, when it appears that they did not make any defense to such liability by any plea, and that they did not traverse the allegation that they received from the tax collector the money to pay the amount due, and the proof shows that they did so receive it.—*Smith v. Hubbard*, S. C. Tenn., Jan. 10, 1887; 2 S. W. Rep. 569.

13. CRIMINAL LAW — *Intoxicating Liquors—Selling without License—Indictment—Mississippi Act of 1884—Special Plea—Motion to Strike Out—General Issue—Evidence.*—Under the Mississippi act of 1884,an indictment for unlawfully selling vinous and spirituous liquors in quantities of from one to five gallons, without a license, according to the requirements of the statute in such case, etc., will be sustained. When defendants were indicted, under the Mississippi act of 1884, for unlawfully selling vinous and spirituous liquors, in quantities of from one to five gallons, without a license, according to the requirements of the statute in such case, etc., and they filed a special plea alleging that they had not unlawfully sold liquors; that they had a license issued to them while liquors were being sold at retail in Columbus under the laws of the State, for one year, which year had not expired at the time they made the sale for which they were indicted; *held*, that it was not error to strike out the plea, as the facts therin stated constituted no defense, and, if they did, they were admissible in evidence under the general issue.—*Trost v. State*, S. C. Miss., Jan. 17, 1887; 1 South. Rep. 49.

14. —— —— *Indictment— Unlawful Retailing—Persons to Whom Sold—Duplicity—Code Miss.—Appeal—Record—Venue—Omission of Exception—Section 1433, Code Miss.*—In Mississippi, an indictment for unlawfully retailing liquor need not designate the individuals to whom the liquor was sold. An indictment under the Mississippi code, alleging the sale by retail of both vinous and spirituous liquors,is not bad for duplicity. Murphy v. State, 28 Miss. 637. Where, in the trial of an indictment for the sale by retail of vinous and spirituous liquors, the record failed to show that any proof of venue was made in the case, but it does not appear that the error or omission was made a ground of special exception in the court below, the judgment under section 1433 of the Mississippi code, cannot be reversed by the supreme court on appeal.—*Lea v. State*, S. C. Miss., Jan. 17, 1887; 1 South. Rep. 51.

15. CURTESY — *Land of Wife Subject to a Trust—Rights of Beneficiary.* — Where a father conveys land to his daughter in consideration that she will support him during his life, and, the daughter afterwards dying, the father's relations with her husband become unfriendly, so that the latter is unwilling to provide proper support, the father is entitled to the use of the land during his life, and, if it should prove insufficient for his support, the court should order so much of it sold as is necessary for that purpose.—*Montgomery v. Sweeney*, Ky. Ct. App., Jan. 18, 1887; 2 S. W. Rep. 563.

16. —— *Seizin of Wife—Possession by Third Person—Gen. St. Ky., Ch. 52, Art. 4, § 1.*—Where a father conveys land to his married daughter, he, however, continuing in possession and control of it until her death, but not in hostility to her right, she and her husband living with the father on the land, the husband, after her death, leaving a child born alive, is entitled to curtesy, the father being considered to have held the land for her use, under Gen. Stat. ch. 52, art. 4, § 1, providing that the husband, where there is issue born alive, shall have curtesy in all realty owned and possessed by his wife at the time of her death, or of which another may then be seized to her use.—*Sweeney v. Montgomery*, Ky. Ct. App., Jan. 18, 1887; 2 S. W. Rep. 562.

17. DAMAGES—*Breach of Contract—Pleading—Evidence—Proximate Cause — Special Damage.*— In an action for a breach of contract by defendant, to give plaintiff a certain time in which to take up tax certificates, by reason of which breach third person has obtained tax deeds of the land, and caused the same to be recorded, and has brought an action against plaintiff to quiet the title to said land, in the absence of an allegation in the complaint that plaintiff has lost possession of it, it is incompetent to introduce proof tending to show the value of the rents and profits of such land, as a foundation for a judgment against the defendant for the loss of its possessions. The action to quiet title was not a proximate or necessary result of the breach, and, no special damages being pleaded, evidence of expenses and attorney's fees in that cause is inadmissible.—*Hancock v. Hubbell*, S. C. Cal., Jan. 14, 1887; 12 Pac. Rep. 618.

18. DESCENT AND DISTRIBUTION — *Personality—Donatio Mortis Causa in Fraud of Widow — Gift Coupled with a Trust—Tombstone.*—A gift of all his money and the great bulk of his personal property to one of his children by a married man, deceased intestate, during his last illness, made with the expressed intent of depriving his widow of her distributive share, will be set aside as in fraud of the widow, although the widow's dower in the land belonging to the estate is sufficient to afford her support. A *donatio mortis causa* to a daughter, made by an intestate for the purpose of cutting off his widow's distributive share, although void as to the widow, will be upheld, after the deduction of the widow's share, where it is coupled with a trust binding the donor; to make certain gifts, and to erect a tombstone for the donor and the distributees, including the widow, must contribute ratably to the erection of the monument. —*Manikee v. Beard*, Ky. Ct. App., Jan. 11, 1887; 2 S. W. Rep. 545.

19. EQUITY—*Laches—Action to Resell Land Sold by Administrator — Demurrer — Laches must be Pleaded—No Dismissal as to All on Demurrer by Part of the Defendants.*—After the lapse of nearly twenty-three years, equity will not entertain a bill by the heirs of one deceased intestate alleging that the administrator of their ancestor, at a sale under order and approval of court, had bought in part of the estate for himself, and subsequently sold it again in different parcels to several parties, and praying that, inasmuch as the purchase money had not been paid to the estate, and the administrator and the sureties on his bond were insolvent, the land might be again sold, each tract for its respective purchase money, there being no averment in the bill of any act or admission on the part of the administrator recognizing the continued existence or binding obligation of his promise to pay for the land. While the defense of staleness may be made by demurrer, when the facts on which it is based appear on the face of the bill, still it is defensive, and must be claimed; and it is error, upon demurrer to a bill open to such objection by some of the parties, to dismiss it as to the remainder, who have neither answered, pleaded, nor demurred.—*Solomon v. Solomon*, S. C. Ala., December Term, 1886-87; 1 South. Rep. 82.

20. —— *Resulting Trust—Contract —Consideration.*—Where an agreement has been signed by the plaintiff in a pending ejectment suit, by which he agrees to pay certain judgments out of the proceeds of the land in case of recovery, the title of the land so recovered will be held by the plaintiff in trust to pay said judgments, and a bill in equity will lie to compel payment. Where such a contract is valid and binding, upon a good consideration, it is no defense that the owner of the judgments has already been fully paid otherwise. M R agreed with another judgment creditor of the same defendant to attack the title of one who had purchased the land of that defendant, and in consideration of his assistance in pursuing his suit, agreed, out of the proceeds of the land when recovered, to pay the judgments of said judgment creditor. After he had acquired the land, M R refused to pay these judgments. *Held*, that such promise was binding, and that the value of the land being sufficient to cover all costs, and, after paying these judgments, to leave more than would indemnify M R, he was in no position to set up the claim that the judgments had been paid in some other way, and that he would be compelled by a court of equity specifically to perform his agreement.—*Weaver's Appeal*, S. C. Penn., Jan. 3, 1887; 19 Weekly Notes of Cases, 101.

21. ERROR—*Writ of—Transmitting Record—Supersedeas Bond—Motion to Vacate.*—When a writ of error has been allowed by the judge of a State supreme court to the United States Supreme Court, but no writ of error has been issued, the clerk of the State court is not bound to transmit to the United States Supreme Court a true copy of the record. When a writ of error has been allowed, but not issued, an order allowing a *supersedeas* bond is a nullity for want of jurisdiction, and the same want of jurisdiction prevents the United States Supreme Court from entertaining a motion to vacate.—*Ex parte Ralston*, U. S. S. C., Jan. 10, 1887; 7 S. C. Rep. 317.

22. ESCAPE — *Indictment — Statutory Contract of Service.*—By the proviso of the first section of the Alabama act (1882-83, p. 166), providing that any person convicted and fined in the courts of that State may be discharged as to the fine, on confession of judgment, with sureties, and execution of a contract to serve the surety, etc., a contract in writing, signed by the defendant in open court, and approved in writing by the judge before whom the conviction was had, enters into the definition, and is an essential ingredient of the offense; and an indictment for escaping from such service, which fails to charge that the contract was in writing, or that it was signed by the defendant in open court, or was approved by the justice of the peace who rendered the judgment of conviction with the requisite precision and certainty, is bad.—*Smith v. State*, S. C. Ala., Jan. 10, 1887; 1 South. Rep. 82.

23. EVIDENCE — *Discovery — Production of Documents — Rev. St. U. S.*, § 724 — *When Material.*— Rev. St. U. S., § 724, relative to the production of documents, does not apply to suits in equity. In equity such production, by one not summoned as a witness, can ordinarily be compelled only by appropriate allegations in bill or cross-bill, upon the answer to which allegations a motion for production is based, and upon such motion the materialty of the evidence sought for can be controverted. The only issue between plaintiff and defendants in a suit in equity was

whether a trust fund, received by defendants under certain agreements made between plaintiff and some of the defendants and between plaintiff and a third party, was appropriated by them pursuant to the agreements. *Held*, that the production by plaintiff of books and documents relating to transactions prior to the date of the agreement would not be compelled.—*Bishoffsheim v. Brown*, U. S. C. C., S. D. N. Y., Dec. 23, 1886; 29 Fed. Rep. 341.

24. —— *Public Records—Search—Secondary Evidence.*—Where, in an action against a county to recover damage for a defective bridge, it was proved that diligent search had been made in the proper office of the county for records and papers pertaining to the the letting out and building of the bridge; that only some of them could be found; and that others had never been recorded: *held*, that a sufficient foundation had been laid for the introduction of secondary evidence, and that it was competent to prove by the contractor who did the work the contents of such as had not been found.—*Williams v. Colbert Co.*, S. C. Ala., Jan. 13, 1887; 1 South. Rep. 74.

25. —— *Secondary — Contents of Lost Instruments—Diligence of Search—Proof by One—Search by Three—Criminal Law—Appeal— Record—Admission of Prosecuting Witness—Presumption as to When Made.*—On the trial of an indictment for selling mortgaged personal property, secondary evidence may be received to prove the execution and contents of the note and the mortgage securing it, where the papers were diligently searched for at the place where they were last seen, by three persons acting together, and on two distinct occasions,and where there is no proof of fact or circumstance tending to show a motive for withholding the papers. It is no objection to the preliminary proof of loss of a paper that only one of three who made the search for it is produced as a witness, where the other two are shown to have been in the State, but in counties distant from the scene of the trial. Where, in a criminal prosecution for selling mortgaged personal property, evidence is offered by the defense to show that the mortgagee had admitted the defendant's right to dispose of the property to a third party, and the record fails to show that the admission was alleged to have been made before the commencement of criminal proceedings, it will be presumed not to have been so alleged, and the exclusion of the evidence by the trial court will be sustained. In a criminal action, the unsworn admission of prosecuting witness cannot be received as evidence in disproof of any fact the State is required to prove.—*Jernigan v. State*, S. C. Ala., Jan. 10, 1887; 1 South. Rep. 70.

26. EXECUTORS AND ADMINISTRATORS—*Administrator Pendente Lite—Admission of Will—Effect of Appeal.*—Where, in proceedings for the probate of a contested will, the orphans' court has appointed an administrator *pendente lite*, and subsequently admits the will, and the executors named therein qualify accordingly, and the parties contesting immediately appeal, the operation of the decree appealed from is suspended, the executors have no power to act, and the functions of the administrator *pendente lite* are revived by and until the determination of the appeal, and the administrator *pendente lite*, pending the appeal, acts under the directions of the appellate court.—*Brown v. Ryder*, Prerog. Ct. N. J., Oct. Term, 1886; 7 Atl. Rep. 568.

27. —— *Advances—Right to be Reimbursed—Administrator De Bonis Non.*—Where an administrator of an estate has, in good faith, and for the benefit of the estate, paid the debts or obligations due by it, out of his own money, he is to that extent said to be in advance to the estate, and entitled to be reimbursed out of it; and, where the admistrator has died before settling the estate, his administrator is entitled to collect it, in a suit against him for a settlement of the former'sa dministration, to which the heirs were made parties, without a judgment for the purpose, if properly brought to the attention of the court, though no administrator *de bonis non* has been appointed upon the estate.—*Pendergrass v. Pendergrass*, S. C. S. Car., Nov. 27, 1886; 1 S. E. Rep. 45.

28. —— *Realizing and Investing — Confederate Money and Bonds—Devastavit—Applying Capital for Expenses—Will—Construction — When Title Vests.*—Where a testator's estate was directed, by the will, to be realized at a time falling within the time of the war, when confederate money was the only legal currency in use, his executor cannot be held liable for losses resulting from realizing at that time in confederate money, or investing the proceeds in confederate bonds; and the inference from his realizing at that time is that he received the proceeds in confederate money. An executor, directed by the will, to keep the estate together for two years, and to apply the income to the support of testator's family and keep up plantation in the same style as theretofore, and to pay the usual charitable and religious contributions theretofore paid by the testator, and afterwards to divide and settle the estate among the beneficiaries, is justified in calling in and applying certain notes due testator for such objects. Where a testator, by the fifth clause in his will, gives the residue of his estate to his children and a grandchild named, and then, in the sixth clause, makes certain provisions as to the shares of his *children*, or those who take as *their* substitutes, and then, in another and seventh clause, makes certain other and different provisions as to the share of his grandchild, the provisions in the sixth clause will not be construed as applying to such grandchild.—*Braham v. Crosland*, S. C. S. Car., Oct. 12, 1886; 1 S. E. Rep. 33.

29. FRAUD—*Fraudulent Conveyances — Debtor Remaining in Possession—Evidence—Chattel Mortgage—Facts of Suits Being Brought on Date of Mortgage.*—The mortgagor in a chattel mortgage, valid on its face and duly recorded, retained the stock of goods mortgaged, sold them at retail on his own account, and made no return of sales to the mortgagee. A month after execution of the mortgage the mortgagee was given possession, but the mortgagor, as her agent, ran the business as before, keeping the proceeds of the sales, and making no returns to her till she took possession, eight months later. Mortgagor's sign remained over the door after the mortgage, as before. The lower court refused to consider the question whether the mortgage was fraudulent, and held it valid. *Held*, error, the evidence tending to show, if it did not conclusively establish, that the mortgage, as to creditors, was fraudulent in fact. The offer was made to show that, on the day the mort-

gage was executed, suits were commenced against the mortgagor by his creditors, which the court refused. *Held*, error, since the testimony was relevant to the question of actual fraud.—*Hisey v. Goodwin*, S. C. Mo., Dec. 20, 1886; 2 S. W. Rep. 566.

30. ——— *Statute of Frauds—Memorandum—Contract to Sell Land—Vendor and Vendee—Refusal to Convey—Recovery of Purchase Money—Tender of Performance.*—A contract for the sale of lands, witnessed by a *memorandum*, drawn by one not a party to it, and signed by him only, is within the statute of frauds, and void. Where a party, who has bargained for land, and received part of the purchase money, retains possession of the premises, and refuses to convey according to the contract, the purchase money paid may be recovered back. Where vendor refuses to perform his part of the contract, the vendee need not tender performance to establish his right of action.—*Welch v. Darling*, S. C. Vt., Jan. 20, 1887; 7 Atl. Rep. 547.

31. GUARDIAN AND WARD—*Wages—Fiduciary Capacity—Arrest—Action Against Guardian—Close-Jail Certificate—§§ 1586, 1503, R. L. Vt.*—Unpaid wages due a ward from his guardian are money assets of the ward in the guardian's hands, and held by him in trust, or in a fiduciary capacity. An action of debt on a probate court's judgment, rendered for wages due a ward by his guradian, is an action to recover money held in trust, or in a fiduciary capacity, and, though the writ did not run against the body, where the court adjudges that the cause of action arose from the willful and malicious act or neglect of the defendant, and that he ought to be confined in close jail, the plaintiff is entitled to a close-jail cerrtificate on the execution, under § 1503, R. L. Vt., although no affidavit has ever been filed by him, under § 1485, R. L. Vt.—*Haskell v. Jewell*, S. C. Vt., Jan. 20, 1887; 7 Atl. Rep. 545.

32. ——— *Rights and Liabilities of Guardian—Allowance to, for Support of Ward, Without Order of Court—Costs in Compelling Guardian to File Account—When Guardian is Liable Therefor.*—A, when a child four years old, was, in 1863, put by her father, upon his enlistment in the army, into the hands of B, upon terms now unknown. A's father was killed in battle in 1864, and A remained with B until 1876, when she left him. In 1867, B, having been appointed A's guardian, applied for and received from the government, as pension due A, and as arrears of pay and bounties due her father, the sum of $1,430.87. A, while living with B, assisted him in his house and in his business, which was that of a saloon keeper, and received from him board, lodging and clothing. In 1883, B died. Upon a petition being presented to the orphans' court by A to compel B's administratrix to file her account as guardian: *Held* (1), that during the early years of her life an allowance should be made the guardian for her maintenance; (2), that during the latter years of her life, under the evidence in this case, the services rendered by her were a sufficient compensation to the guardian for her support; and (3), that the guardian's estate should pay the whole cost of the proceedings in the orphans' court.—*Simons' Appeal*, S. C. Penn., Jan. 31, 1887; 19 Weekly Notes of Cases, 94.

33. HUSBAND AND WIFE—*Divorce—Opium Eating of Wife—Custody of Child to Husband—Bond.*—Although the wife has become addicted to the constant use of morphine and opium, to an extent that has seriously injured her mentally and physically, and carried her at times into the company of prostitutes, yet, where it appears that she had never been actually unchaste, and that the unkindness of the husband has been instrumental in bringing her to her present condition, the husband should be refused a divorce. Although a father neglected for a time to provide a support for his child (a daughter five years old), yet, having afterwards reformed, and gone to work, he is entitled to the custody of the child, the mother beine addicted to the use of opium, though not unchaste; but a bond, with surety to provide suitable support, executed to the court's commissioner, should be required of the father, and the right of the mother to see the child reserved.—*Finley v. Finley*, Ky. Ct. App., Jan. 15, 1887; 2 S. W. Rep. 544.

34. ——— *Subjecting Equitable Interest to Payment of Debts—Equity—Suit to Subject Lands to Payment of Debts—Pleading.*—Where lands are conveyed to a husband in trust for the use and benefit of his wife and her children, for their support, and the education of the children, and, if the wife dies, then for the education and support of the children during the husband's life, and upon his death to be equally divided among the children; but, if the wife survive the husband, she to take a child's share of the property, but in any event her interest to cease at her death—during the life of the husband, and the existence of the possibility of other children being born, who would have an interest in the property, the wife has no separable interest therein which can be subjected to the payment of her debts. Where lands are conveyed to a husband in trust for the use of his wife and children, and no benficial interest is given him, in a suit to subject the lands to the payment of the debts of the husband and wife the bill is demurrable where a claim for relief against the husband is based on an interest in the lands in him.—*Bell v. Watkins*, S. C. Ala., Jan. 14, 1887; 1 South. Rep. 92.

35. ——— *Suit for Support—Evidence—Burden of Proof—Fraudulent Conveyance—Allowance to Wife—Amount.*—In a suit by a wife, who has been abandoned by her husband, to have alimony allowed her from his estate, when in her bill she alleges that her husband has made a voluntary conveyance of some of his land to his brother to avoid her claim attaching thereto, and asks that such land be subjected to her claim, and the brother, a party defendant, answers, alleging that he is a *bona fide* purchaser thereof for value, the burden is on the complainant to establish the allegations of her bill, and there being no evidence of bad faith, or failure to pay the purchase money, such land cannot be subjected to her claim. The fact that previous to her marriage unfounded rumors affecting the chastity of a women were circulated, is no ground for her husband to abandon her, and escape his marital responsibilities; and, when he does so on such grounds, an allowance to the wife out of the husband's estate will be decreed. An allowance of $150 per annum will not be deemed excessive when the husband is shown to have from $1,200 to $2,000 worth of property

and to be able to earn more than his support by his labor.—*Verner v. Verner*, S. C. Miss., Jan. 17, 1887; 1 South. Rep. 52.

36. INSOLVENCY—*Partnership — Absconding Partner—Power of Remaining Partner.*—When one of two partners has absconded from the State, the remaining partner cannot, in the name of the firm, under the Maryland act of 1884, extending the provisions of insolvent laws to partnerships, in applying for the benefit thereof, transfer the separate and individual property of the other partner, for distribution, to a trustee, among the creditors of the partnership.—*Second Nat. Bank of Baltimore v. Willing*, Md. Ct. App., Jan.4, 1887; 7 Atl. Rep. 558.

37. JURISDICTION — *Supreme Court of United States—Federal Question.*—Under his application, in 1874, to the state surveyor general of California, plaintiff claimed real estate listed March 21, 1876, by the secretary of the interior to the State of California, as part of its selection under section 8, act of congress of September 24, 1841 (chapter 16), for the purpose of internal improvements. Defendant claimed the property under a location under State law, and purchase with school warrants in 1857. Plaintiff sued out a writ of error in the United States Supreme Court to the Supreme Court of California. *Held*, that as the right of the State, under the act of 1841, was admitted, and as, under that act, the title of the State inures to the purchaser, the determination of the question involved no federal right in the parties denied by the State court.—*Mace v. Merrill*, U. S. S. C., Jan. 10, 1887; 7 S. C. Rep. 330.

38. —— *Removal of Causes—Citizenship—Filing of Articles by Foreign Corporation.*—The filing by a foreign corporation of its articles of incorporation with the secretary of State of Iowa, as required by 18 Iowa Gen. Assem. *ch.* 128, does not alter its *status* as a foreign corporation; and, in an action brought against such a corporation by an Iowa corporation, the defendant may have the cause removed from a State court to a United States circuit court.—*Chicago, etc. R. Co. v. Minnesota, etc. R. Co.*, U. S. C. C., N. D. Iowa, E. D., Nov. Term, 1886; 29 Fed. Rep. 337.

39. LANDLORD AND TENANT—*Distress for Rent—Failure of a Third Party to Claim Goods—Replevin—Code Miss. 1880, § 1327—Sale—Conditional Sale—Liability of Goods to Execution—Code Miss. 1880, § 1300.*—Where goods in the possession of a tenant are distrained for rent, a person claiming the goods is precluded from maintaining an action for their recovery, if he has failed to interpose his claim in pursuance of Code Miss. 1880, § 1317. Where a person who is a "trader," within the meaning of Code Miss. 1880, § 1300, purchases property under an agreement by which he is to obtain possession, but the title is not to pass until the installments of the price have been fully paid, such property is, under said section, liable to execution at the instance of a creditor of the purchaser, if the sign displayed by the latter fails to indicate the true ownership of the property.—*Paine v. Hall's Safe & Lock Co.*, S. C. Miss. Jan. 10, 1887; 1 South. Rep. 56.

40. —— *Renewal—Interests in Dispute.*—Where a suit is brought by the assignee of a lease for a long term of years, with a covenant for renewal forever, against the legal representatives of the deceased lessor, whose respective rights in the land are in litigation, the court will decree that all such representatives as claim any interest in the property unite in the renewal of the lease, and leave their respective interests to be determined in the other suit.—*Bratt v. Woolston*, Md. Ct. App., Jan. 5, 1887; 7 Atl. Rep. 563.

41. MALICIOUS PROSECUTION—*Probable Cause—When a Question of Law.*—What constitutes probable cause, or whether there was probable cause for the prosecution, is generally a mixed question of law and fact; but, if the facts are undisputed, it then becomes a question of law, to be determined by the court.—*McNulty v. Walker*, S. C. Miss., Jan. 17, 1887; 1 South. Rep. 55.

42. MANDAMUS—*Transfer of Stock. — Mandamus* does not lie against the officers of a private corporation to compel the transfer of stock. *Tobey v. Hakes*, S. C. Conn., Dec. 6, 1886; 7 Atl. Rep. 551.

43. MORTGAGE—*Foreclosure — Decree — Sale under Second of Two Decrees — Jurisdiction.*—A sale under the latter of two decrees of foreclosure rendered in the same suit is not void for want of jurisdiction when the second is made at the same time with the first, and is the same as the first, except that it gives the boundaries of the property to be sold as one tract, and also the boundaries of each of the several parcels into which it was divided.—*Barrell v. Telton*, U. S. S. C., Jan. 10, 1887; 7 S. C. Rep. 332.

44. —— ——*Defenses— Validity of Mortgage—Consideration — Secret Agreement — Measure of Proof — Evidence.*—In a suit to foreclose a mortgage, in order to support a defense that the mortgage was, by virtue of a secret agreement between the parties, without consideration, the proof should be as clear and convincing as that required for the reformation of written instruments. Evidence considered, and held not to sustain the position that certain notes and mortgages were executed for accommodation, and without consideration—*Bray, Receiver, etc. v. Comer*, S. C. Ala., Jan. 4, 1887; 1 South. Rep. 77.

45. NEGLIGENCE—*Railroad Companies—Lookout—Signals—Damages—Evidence—Deafness—Knowledge by Employees — Trespasser — Contributory Negligences.*—While it is the general duty of a railroad company to keep a proper and vigilant lookout for obstructions and other dangers, including, it may be, trespassers, it is not an absolute and particular duty to an intruder upon the track, so far as to constitute the omission to discover him, and to give the cautionary signals, negligence *per se*, as to such intruder. But, where those in charge of a moving train see a person walking on the track, a due regard for human life, and due precaution against unnecessary injury, require the usual signals of warning to be given. In an action against a railroad company to recover damages for death caused by negligence, in the absence of proof showing that the employees of the train were informed of the deafness of deceased, he must be regarded, so far as the duty of the defendant is concerned, as in the full possession of his faculty of hearing. A trespasser voluntarily placing himself in danger as-

sumes the risk and is guilty of contributory negligence.—*Frazer v. South & North Alabama R. Co.*, S. C. Ala., Jan. 12, 1887; 1 South. Rep. 85.

46. —— *Unavoidable Accident.*—An instruction that, if the train was running at lawful speed, and had the customary appliances and force of trainmen, and the stock, when it was or might have been seen by the engineer with due care, was so close that the train could not be stopped in time to avoid striking it, then the plaintiff could not recover, is correct.—*Joyner v. S. Carolina R. Co.*, S. C. S. Car., Jan. 4, 1887; 1 S. E. Rep. 52.

47. PARENT AND CHILD—*Wages of Step-Children—Liability of Step-Father—Lien—Equitable—Proceeding to Enforce—Pleading—Describing Land—Exhibits.*—While a step-father who hires out his step-children must account to them for amounts collested on account of their hire, yet he is entitled to deduct their board, clothing, and doctor's bills. But it appearing in this case that he generally contracted that the hirers should board and clothe the children, and, when they were at his house, he made them work, he is not entitled to any such allowance. Where a step-father has collected wages due his step-children for work done by them during their minority, and appropriated the amount to his own use in the purchase of land, the children have an equitable lien upon the land as against him for the amount of their wages, and they might join, even under Myers' Civil Code, in an action to enforce the lien. Although, in a suit to enforce a lien on land, the land is not described in the body of the petition by metes and bounds, it is sufficient if so described in the deeds filed as exhibits, and in the judgment.—*Boyd v. Jones*, Ky. Ct. App., Jan. 13, 1887; 2 S. W. Rep. 552.

QUERIES AND ANSWERS.*

[*Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.*]

QUERIES.

Query No. 9. A sells B a house and lot; B is to pay for same in monthly installments. A executes to B a bond, conditioned that, upon full and punctual payment of said installments, and demand made by B, A will execute to B a good and sufficient general warranty deed. Afterward A dies, leaving surviving him one minor heir. There is an administrator appointed for A's estate. B paid two installments before A's demise, but since has paid none, and is now three installments in arrears, leaving about thirty unpaid installments. Who is the proper party to bring suit against B, the administrator or the guardian of the minor heir, and what would be the nature of the suit? Shall it be a suit to quiet title, or will suit have to be brought on B's notes, judgment taken and B's interest sold, or can a suit be brought against B to forfeit his bond? Will some one please answer, citing authorities? The subject-matter is in Indiana. W.

QUERIES ANSWERED.

Query No. 23 [23 Cent. L. J. 312]. A lives in Louisiana, but does a mercantile business in Mississippi, through a resident agent, B. B employs a salesman, C, for A. Can D, a Mississippi creditor of C's, garnish the non-resident, A, by service of process on B? Again: A owes D, by promissory note (same parties). Can D garnish A by service on B? Cite authorities.

Osyka, Miss. J. B. S.

Answer. Under the Mississippi law, anyone who has in his possession the effects of the defendant can be garnished, or such effects can be attached. Rev. Code Miss. §§ 2423, 2442*d*. The law also provides that the defendant shall be notified by publication. § 2437. B can be garnished, or A's effects in B's hands can be attached, but service on A must be by pnblication.

M.

RECENT PUBLICATIONS.

AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES, especially designed for Students, General and Professional. By John Norton Pomeroy, LL. D., author of "Lectures on International Law in Time of Peace." Ninth Edition, Revised and Enlarged, by Edmund H. Bennett, LL. D., Dean of the Boston University Law School. Boston and New York: Houghton, Mifflin & Company, The Riverside Press, Cambridge. 1886.

This, it will be observed, is the ninth edition of a well-known standard work on one of the most important subjects which could possibly employ the talents and occupy the time of a learned American jurist to prepare, or of the diligent and assiduous lawyer to study.

The limited space at our command for notices of this description, precludes us from commenting as fully as we desire upon the merits of this excellent work. We can only say that the subject is of paramount importance, and the treatment of it by the learned author and the accomplished editor, under whose auspices this edition is produced, is worthy of it. As a compendium of the constitutional law of the United States this work will be, as in its previous editions it has heretofore been, of great value to all students of law in its organic and philosophical aspects. And in addition the work will afford important practical assistance to gentlemen who habitually or occasionally find it necessary to deal with constitutional questions.

The arrangement of the work is entirely unexceptionable, and it is an evidence of the care and thoroughness with which the editor has performed the duty which he has assumed, that in an appendix he has brought the work down to date, by abstracts of all recent decisions of federal courts on important constitutional questions.

As the book is issued from the Riverside press, it is unnecessary to say that in typography and general execution it is perfect.

JETSAM AND FLOTSAM.

JUDICIAL PATIENCE.—Patience is a quality which greatly adorns a judicial officer. A well-known judge of a former generation in Tennessee was liberally endowed with this admirable quality, either by nature or by long service on the bench, and found occasion for it once in divers colloquies with a cobbler. This artist was under contract to furnish the judge with a pair of boots. After numerous continuances for many weeks "till next Saturday," "Monday evening," "Thursday morning," "Friday, dead sure," the judge drew up one evening before the cobbler's door: "Now yonder comes Judge A—— again for them boots!" exclaimed the cobbler, upon seeing him. "Oh! no, indeed!" Mr. T——," replied the judge, shocked and surprised; "Not at all! Not at all, I only came to make another appointment."